Prepublication Version. Engagement’s Possibilities and Limits as a Socioeconomic Rights Remedy

Brian Ray
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I. INTRODUCTION

In February 2009, the Constitutional Court of South Africa developed an innovative remedy in housing-rights cases that it termed “engagement.” In its most basic form engagement requires municipalities to use negotiation or mediation when it becomes clear that adoption of a new policy will require evicting residents. But the Court’s description of engagement envisions much broader application and imposes potentially far-reaching obligations on municipalities and other levels of government. At the same time, engagement offers a potentially powerful tool to civil society organizations active in socioeconomic rights issues.

The Court has used the engagement remedy in just two cases since first developing it in *Olivia Road*. In the first case, the Court unsuccessfully attempted to use engagement to resolve an urgent dispute over the time-frame and terms for closing camps housing refugees from the xenophobic violence that wracked South Africa in May 2008. In the second, the Court has used engagement to give residents some measure of control over the implementation of what one commentator has called “the largest judicially sanctioned eviction of a community in South Africa’s post-apartheid period.” These two cases, together with *Olivia Road*, offer important lessons for understanding both the untapped potential of engagement as well as its limits.

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1 Occupiers of 51 Olivia Road v City of Johannesburg, 2008 (5) BCLR 475 (CC).
2 Id.
3 Mamba v. Minister of Social Development, CCT 65/08 (2008); Residents of Joe Slovo Community v Thubelisha Homes, CCT 22.08 (2009).
4 Mamba, *supra* note 3.
This Essay first analyzes the Court’s three engagement decisions and then divides engagement into two different categories—litigation engagement and political engagement—and offers suggestions for transforming the process into a more effective remedy in each category. Drawing on the empirical work of Charles Epp, the Essay argues that political engagement, if structured correctly, offers the greatest potential for turning engagement into an effective mechanism for enforcing socioeconomic rights. Realizing that potential will require a sustained commitment by civil society organizations active on socioeconomic rights issues and a shift from using engagement as a litigation tactic into a tool for political advocacy.

II. THE ENGAGEMENT CASES

A. Olivia Road: A Successful Engagement

*Olivia Road* began as a series of emergency applications in the Witwatersrand High Court by the City of Johannesburg to evict over 300 people from six properties in inner-city Johannesburg. The City sought these evictions as part of a broader regeneration strategy, one aspect of which was the identification, clearance and ultimate redevelopment of over 200 “bad” buildings with some 67,000 occupants in the inner-city district.7

Several civil society groups and NGOs coordinated the residents’ challenge to these evictions with tremendous initial success. The high court rejected the City’s eviction application and issued a broad order holding that the City had violated the right to access to adequate housing in section 26 of the Constitution by pursuing these

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6 *City of Johannesburg and Rand Properties (Pty) Ltd.*, Case No. 04/10330, at para. 2 (“City of Johannesburg High Ct.”).
7 See Centre on Housing Rights and Evictions, *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* (March 8, 2005), at 41-46, 60-64 (describing the regeneration plan and the practice of forced evictions) (“Any Room?”).
evictions without a plan to house the evicted residents.\textsuperscript{8} The court also enjoined the City from seeking to evict the residents and ordered it to develop a plan for housing these and other residents, as required by \textit{Grootboom}, the Court’s first housing-rights decision.\textsuperscript{9} But, on appeal, the intermediate appellate court, the Supreme Court of Appeal or SCA, reversed the high court’s order and held that the evictions were constitutionally permissible and triggered only a much more limited responsibility by the City to relocate the displaced residents.\textsuperscript{10}

The residents appealed the SCA’s order to the Constitutional Court, which accepted the application in May 2007.\textsuperscript{11} The Court heard oral argument on August 28, 2007 and two days later issued its first “engagement” order requiring the parties to “engage with each other meaningfully . . . in an effort to resolve the differences and difficulties aired in this application in light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.”\textsuperscript{12} The Court also ordered the parties to file affidavits reporting the results of the negotiations with the Court approximately one-month later.\textsuperscript{13}

After engaging over several months, the parties eventually reached a partial settlement that largely granted the residents the terms they had sought and won at the high court and also incorporated provisions for broader change in the City’s inner-city

\textsuperscript{8} \textit{City of Johannesburg High Ct.}, supra note 6.
\textsuperscript{9} \textit{Id.} Order paras. 3-4. In \textit{Grootboom}, another eviction case, the Constitutional Court held that the housing policies at the national, provincial and local levels unconstitutional because they lacked any plans for dealing with the emergency needs of citizens facing eviction and required the government to develop plans for dealing with such situations.
\textsuperscript{10} City of Johannesburg v Rand Properties (Pty) ltd, 2007 SCA 25 (RSA).
\textsuperscript{12} \textit{Id.} at para. 1.
\textsuperscript{13} \textit{Id.} at para. 3.
housing policy. Among other things, the City agreed to cease its eviction attempts and to take specific measures to make the existing buildings safer and more habitable by cleaning the buildings, providing sanitation services, access to water and functioning toilets. Before relocating the residents from the buildings designated for redevelopment, the City agreed to refurbish several other buildings in inner-city Johannesburg and to provide essential services at reasonable cost. Finally, the City agreed to continue to engage on longer-term solutions to the housing crisis.

The parties returned to the Court seeking not only approval of the specific terms of the settlement, but also a decision on the larger issue central to the case: whether the City had a plan that complied with *Grootboom*’s requirements. While the settlement largely remedied the individual residents’ concerns, the *Grootboom* issue was key to whether the litigation would have effect beyond these specific individuals. At this point, both sides viewed the settlement as important but subsidiary to the plan issue and many expected the Court to use this decision as an opportunity to clarify and possibly expand the substantive requirements of section 26 as it had done in a very tentative manner in *Grootboom*.

The City argued that a plan it had developed as the litigation progressed was adequate, and the Court should approve it. The residents argued that the City failed

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14 Settlement agreement between City of Johannesburg and the Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg dated 29 October 2007 at paras. 2-4. (copy on file with the author).
15 Id. at para. 18.
17 See, id. (discussing the differences between the Court’s enforcement approach in *Grootboom* and *Olivia Road*).
to consult them or others on the plan and that the Court should order further briefing on the issue.\textsuperscript{18}

To the surprise of both sides, in its final opinion and order issued several weeks later, the Court refused to address the \textit{Grootboom} issue.\textsuperscript{19} Instead the Court formalized the engagement process that resulted in the settlement in this case into a constitutional requirement for all future cases where eviction is a possibility. The Court first located engagement within several constitutional provisions, including the state’s obligation to “encourage the involvement of communities and community organizations in local government,” as well as the rights to human dignity and life.\textsuperscript{20} The Court then described in more specific terms what engagement should entail.

First, the Court re-emphasized that engagement is part of the broader reasonableness requirement it had established in \textit{Grootboom} and that reasonableness may in some situations require “making permanent housing available while in others, to provide no housing at all. The possibilities between these extremes are almost endless.”\textsuperscript{21}

Second, in most cases, and in particular where a large-scale program is involved, engagement cannot be “ad hoc.”\textsuperscript{22} This means that wherever government begins a long-term planning process like the City of Johannesburg’s redevelopment project, the entity responsible must build engagement into that process from the outset. Long-term engagement of this type will require a cadre of “competent sensitive council workers

\textsuperscript{18} See Karen Brit Affidavit in \textit{Olivia Road, available at} www.constitutionalcourt.org.za (search “cases for” 24/07 and select “First Respondent’s Supplementary Affidavit” from “Pleadings and Documents”) (Aug. 2007).
\textsuperscript{19} Olivia Road, \textit{supra} note 1.
\textsuperscript{20} \textit{Id.} at para. 16.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.}
skilled in engagement.”

In other words, key bureaucratic and administrative structures must incorporate engagement and engagement training. The government has an obligation to use those resources to engage well before litigation is even a possibility.

Third, the Court acknowledged the vulnerability of citizens facing evictions and the need for skilled representation. To deal with this power imbalance, the Court specifically recognized that civil society groups have a constitutional role to play: “Civil society organizations that support the peoples’ claims should preferably facilitate the engagement process in every possible way.”

Finally, the Court required the government to develop and maintain a public record of each engagement so that courts can later review not only the outcome but also the engagement process. Emphasizing that “secrecy is counter-productive to the process of engagement,” the Court stated “the provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality with that process would ordinarily be essential.” Courts are then empowered to review “[w]hether there had been meaningful engagement between a city and the resident about to be rendered homeless.” The Court emphasized that failure to meaningfully engage can by itself—and irrespective of the substantive merits of the policy requiring eviction—be the basis for a court to deny an eviction request: “The absence of engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an eviction order.”

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23 Id. at para 19.
24 Id. at para. 15.
25 Id.
26 Id. at para. 21.
27 Id.
28 Id.
Olivia Road represents the high watermark for engagement to date. Although real engagement occurred extremely late in the process—literally after the parties had left the courthouse—it nonetheless was highly effective in obtaining substantial relief with genuine commitment to the remedy from both sides. As I discuss in Part III, below, the procedural posture of the case, in particular the high court’s injunction, played an important role in the effectiveness of engagement in this case.

The Court’s next two attempts at ordering engagement were less successful—although the process remains incomplete in one of those cases. After describing those two cases, Part III compares and contrasts them with the extraordinary success of Olivia Road. It then divides the different situations in which engagement can be used into two broad categories and offers suggestions for making engagement a more effective remedy in each.

B. Mamba: A Failed Engagement

The second case provides an example of the Court extending engagement to a new context, closure of refugee camps by the Gauteng government.\(^{29}\) The Court’s reliance on engagement to deal with a highly charged and urgent situation is strong evidence of its commitment to this remedy. But the final result—complete refusal by the provincial government to meaningfully engage—illustrates the problems with over-reliance on engagement and more specifically the risks of using engagement to deal with a rapidly changing situation where the government faces fewer formal constraints and has strong incentives to implement its original policy.

The violent xenophobic protests that began in Johannesburg and extended to Durban and Cape Town in May 2008 displaced tens of thousands of people in South

\(^{29}\) Mamba, supra note 3.
Africa. Provincial governments in several areas, including Gauteng, which covers Johannesburg, established temporary camps to provide security and shelter for victims of the violence. Several NGOs and other organizations provided logistical and financial support to the relief effort and began working with provincial and local governments on medium- and long-term solutions for the camp residents.

Once the violence subsided, an urgent debate developed over how to deal with the refugees that remained in the temporary camps. Advocates for the refugees argued that simple closure posed real risks to the refugees and would also fail to deal with the more systemic issues that gave rise to the violence. Several provincial governments, however, characterized the violence as isolated incidents and sought to close the camps soon after the attacks subsided.

The Gauteng government was among the most aggressive in these efforts, initially ordering closure of several camps by July 2008 and later extending that deadline to August 15, 2008. Several organizations, led by the Consortium for Refugees and Migrants in South Africa (CoRMSA), an umbrella organization that includes several of the organizations active in the relief efforts, pressed the government to delay the closures until it developed and published a reintegration plan. When the government ignored

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30 See, e.g., Newsletter, ed. 11, CoRMSA (Dec. 19, 2008) (“As we come to the end of a turbulent year, let us reflect on what has been an extremely challenging year for us all. We witnessed the widespread violent xenophobic attacks on foreign nationals from January which then culminated in the now infamous May attacks.”).
31 See, e.g., Newsletter Ed. 10, CoRMSA, Xenophobia Stakeholders Meeting (May 9, 2009) (“On 17th April, a number of civil society organisations and one government department met to discuss further issues relating to the spate of xenophobic attacks that have plagued the country.”), available at http://www.cormsa.org.za/news/.
their request and publicly announced plans to move forward with the closures, CoRMSA sued for an injunction to stop the closures.

After losing at the high court, the refugees sought direct access to the Constitutional Court even though the Court was in recess. The Court held an emergency hearing on the application the following Monday, August 18, 2008 and issued an interim order on August 21. The Order temporarily prohibited complete closure of the camps, subject to certain limitations, including the right to consolidate shelters and to deport illegal immigrants. But it also required, in language nearly identical to the Olivia Road engagement order, that the parties,

engage with each other meaningfully and with all other stakeholders as soon as it is possible for them to do so in order to resolve the differences and difficulties aired in the application in the light of the values of the Constitution, the constitutional and statutory obligations of the respondents and the rights and duties of the residents of the shelters. Paragraph 5 of the Order specified that the engagement should include “[o]ther role players,” including several NGOs that had provided support to the camps. As in Olivia Road, the Court also required the parties to report the results of the engagement to the Court within several weeks.

The Gauteng government adopted a narrow reading of the Order and refused outright to negotiate a reintegration plan with CoRMSA and others. Instead, the provincial government read the August 21 Order as requiring merely that it keep the

37 Mamba Aug. 21 Order at para. 1.
38 Id. at para. 5.
refugees and the groups listed in the Order apprised of its continued plans for closing the camps and moved forward with the closure process.\(^{39}\)

Following a hearing in September, the Constitutional Court tried to force engagement once again but with little success. The Court issued another interim order requiring the government to maintain the camps and continued engagement under the guidelines of the August 21 Order.\(^{40}\) But the Gauteng government persisted in its narrow view of the Court’s orders and began closing the camps without consulting on a reintegration plan.\(^{41}\) On October 16, 2008, CoRMSA withdrew the application and dismissed the case as moot.\(^{42}\)

*Mamba* demonstrates that engagement will not always result in the kind of successful settlement that it produced in *Olivia Road*. The critical question is what made the difference in these two cases, and the procedural posture of each case plainly plaid a significant role. In *Olivia Road*, the high court’s initial injunction put a stop to the City’s eviction process. And, while the SCA’s judgment permitted the City to resume evictions, it still placed restrictions on that ability and imposed certain costs that required revising the original policy. Once the case reached the Constitutional Court, the City was already well on its way to instituting a revised policy, and the engagement order gave the residents and the groups representing them sufficient leverage to force the City to take seriously their views on the policy.

\(^{39}\) *Mamba* Applicant’s Sept. 2008 Supplementary Affidavit at para 10. (“The mode of engagement consists of informing the applicants and other stakeholders of what the [local government] and provincial government are entitled to do in terms of the court order as the government authority responsible for the management of the disaster declared in the wake of the xenophobic violence.”)

\(^{40}\) CoRMSA September 17, 2008 press release.


\(^{42}\) CoRMSA October 16, 2008 press release.
Mamba presented precisely the opposite situation. The high court found no basis for a challenge to the closures; there was no intermediate appellate review, and the refugees asked the Constitutional Court to address a fluid situation with almost no substantive record. Under those circumstances, it was quite easy for the Gauteng government to treat engagement as nothing more than the equivalent of a formal notification requirement rather than the real consultation that the Court plainly expected.

These differences highlight the political nature of engagement and its dependence on sufficient incentives for the political branches to take the process seriously. The ambiguity inherent in engagement provides ample opportunity for resistance and without additional political constraints allows the government to fail to take it seriously in many situations without real political cost. The Gauteng government’s narrow reading of what engagement required exemplifies this weakness.

These differences also suggest that courts must use the remedy in ways that both encourage the political branches to take it seriously and also permit stronger court intervention where appropriate. I discuss these possibilities in Part III, below.

More broadly, the Mamba result reinforces the need to develop engagement as a structured long-term process, rather than relying on it solely as an ad hoc remedy during an ongoing case. As the Court emphasized in Olivia Road, engagement will work best where it is built into the policy development process from the start.43 This is the basis for what I call “political engagement” developed in Part III.B, below.

Pushing engagement back into the policy-development process raises difficult questions. For example, at what level of government and at what point in the process does it make sense to engage and who should the authorities engage with? In the Court’s

43 Olivia Road, supra note 1, at para. 21.
most recent—and as yet incomplete—engagement effort, Justice Sachs’ critique of the failed engagements that led to the litigation provide some starting points for answering those questions. In Part III.B, I describe those critiques and then, drawing on Charles Epp’s studies of administrative implementation of rights, I offer suggestions for how engagement might be developed into a more of a political tool rather than merely a litigation tactic.

C. Joe Slovo: Refining Engagement

The Court’s most recent decision incorporating engagement involved the City of Cape Town’s major redevelopment project along the N2 Highway, the principal North-South corridor leading into Cape Town. 44 The project required the eviction and relocation of over 4000 families living in an informal community known as the Joe Slovo settlement to Delft, an area much further from the city where many of the residents worked. 45 This project was part of the Breaking New Ground policy—a broader national policy developed following Grootboom to redevelop informal settlements throughout the country and was intended to serve as a model for other, similar projects. 46

Many of the residents originally embraced the plan, in part because the City and the developer promised that most of them would be entitled to return to the new development and acquire new low-cost rental housing. 47 But when the first of the three phases of the project was complete, none of the houses were allocated to the lowest rental range the residents say they were promised. In addition, phase 2 included no housing for

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45 Joe Slovo, supra note 3, at para. 125 (Mosenke, DCJ).
46 Id. at para. 24 (Yacoob, J) and para. 327 (Sachs, J).
47 Id. at para 327 (Sachs, J) and paras. 31-33 (Yacoob, J).
low-income residents, only “bonded housing,” i.e. market-rate housing for purchase through a mortgage.\(^{48}\)

Upset at what they called the “broken promises” of the first two phases, the residents began to organize both formal and informal protests against the development.\(^{49}\) The local, regional and national governments along with the developer, Thubelisha Homes, brought an emergency application in the Cape High Court seeking an injunction ordering the eviction of the residents under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998, known as “PIE.”\(^{50}\)

The High Court issued a decision permitting the relocations to proceed and denying the residents relief shortly after the Constitutional Court issued its opinion in *Olivia Road*. The judge made passing reference to the engagement requirement and, in a parenthetical aside, found that the numerous meetings the City Council held with residents “along with multiple averments in the court papers of meetings and/or consultations that were held with the residents of Joe Slovo indicates that there was a sufficient amount of engagements . . . regarding this matter.”\(^{51}\)

The residents appealed directly to the Constitutional Court.\(^{52}\) Several of the same groups that were active in organizing the residents in *Olivia Road* submitted *amicus curiae* briefs to the Constitutional Court in which they argued specifically that the City of

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\(^{48}\) Id. at para. 33 (Yacoob, J) and para. 371 (Sachs, J).

\(^{49}\) Id. at para. 34 (Yacoob, J) and paras. 327, 376-78 (Sachs , J).

\(^{50}\) Id. at para. 15 (Yacoob, J).

\(^{51}\) Id. at para. 24.

\(^{52}\) See Pearlie Joubert, *It’s our duty not to be silent*, MAIL & GUARDIAN Aug. 24, 2008 (Cape Town) (“In a surprise move, the Constitutional Court gave the community permission to challenge the ruling and approach it without going through the Supreme Court of Appeal.”).
Cape Town failed to adequately engage with the residents.\textsuperscript{53} The Court granted those groups permission to present this issue at oral argument.\textsuperscript{54} During the hearing, the Deputy Chief Justice Dikgang Moseneke, in a move reminiscent of \textit{Olivia Road}’s interim order, suggested the amici were correct by “interven[ing] to suggest that the parties talk to each other and advise the court on a `just and equitable’ solution.”\textsuperscript{55}

Unlike in \textit{Olivia Road}, however, this last-ditch effort at resolving the issues through negotiation failed, and the Court issued its decision in June 2009. The decision consists of five different opinions spanning 221 pages. All five opinions agree that neither section 26 or the PIE protect the residents from eviction, and all five also concur in the final order that prescribes a structured eviction process requiring engagement with the residents to determine most of the significant details for eviction and relocation.\textsuperscript{56}

Early reaction has been generally critical of the Court’s refusal to find in favor of the residents. Sandra Liebenberg describes the result as “the largest judicially sanctioned eviction of a community in South Africa’s post-apartheid period.”\textsuperscript{57} Pierre de Vos, while acknowledging that “the judgment shows a genuine concern for the plight of the Joe Slovo residents,” criticizes the substantive holdings as failing to expect “the state to act in an honest manner and to cater also for the most vulnerable and poor members of a well-established community whose area is to be upgraded.”\textsuperscript{58}

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\textsuperscript{53} \textit{See id.} (noting that “[t]he community law centre of the University of the Western Cape and the Centre for Housing Rights and Evictions were admitted as friends of the court, in support of the residents right to be properly consulted before being evicted.”).
\textsuperscript{54} \textit{See Mamba Further Directions by the Chief Justice 15 August 2008, available at www.constitutionalcourt.org.za} (search “cases” for “Thubelisha Homes” and select “Further Directions by the Chief Justice 15 August 2008” from “Pleadings and Documents”).
\textsuperscript{55} Pearlie Joubert, ‘\textit{It’s our duty not to be silent}’, \textit{MAIL & GUARDIAN} Aug. 24, 2008 (Cape Town).
\textsuperscript{56} Joe Slovo, \textit{supra} note 3, at paras. 4-5 (Yacoob, J).
\textsuperscript{57} Liebenberg, Op. Ed., \textit{supra} note 5.
\textsuperscript{58} Constitutionally Speaking, \url{http://constitutionallyspeaking.co.za/?paged=2} (June 14, 2009).
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From the perspective of the success of the engagement remedy, Joe Slovo represents a mixed result. It is clear that at least some members of the Court hoped that engagement would work as it did in Olivia Road, relieving them of the responsibility for deciding the difficult substantive issues presented in the case. Justice Moseneke’s reported remarks are evidence of that. Justice Sachs also mentioned these efforts in passing, and participants in the case confirm that the Court urged the parties to engage following oral argument.\(^ {59}\)

But the residents of Joe Slovo were in a different position than those in Olivia Road and had good reasons to resist further engagement. First, as Justice Sachs pointed out, the government’s attempts at engagement up to that point were characterized by “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.”\(^ {60}\) This combined with their sense that the government had deceived them about the terms of the project hardened the residents’ position over time and left them less willing to trust either that the government would negotiate seriously or fulfill whatever commitment resulted from the negotiations.

More importantly, unlike the Olivia Road squatters, most of whom had no significant attachment to the specific buildings in which they were living, the Joe Slovo residents were part of a long-standing community that would be significantly disrupted even if the government honored the commitment to permit 70\% of the residents to return

\(^ {59}\) See Joe Slovo, supra note 3, at para. 399 (Sachs, J) (noting that “after extensive argument at the hearing, the Court invited the parties to attempt to attempt to reach an agreed solution). See also Brian Ray Notes from March 2009 interview with Sandra J. Liebenberg. Liebenberg was a member of the legal team for the amici curiae in Joe Slovo. See Liebenberg Op. Ed., supra note 5.

\(^ {60}\) Joe Slovo, supra note 3, at para. (Sachs, J).
to the new development. One critical issue in the case was whether the PIE even applied to these residents because the City had granted them implicit consent to reside there over the long course of the community’s development.\(^\text{61}\) If the City had granted such consent, then the eviction procedures under PIE would not apply. The residents felt strongly that they deserved a definitive court ruling on that specific \textit{legal} question before they should be forced to negotiate with the government over the terms of the redevelopment and relocation.\(^\text{62}\)

In the end, the Court was forced to decide that issue without the benefit of an agreement by the parties. It did, however, make engagement a centerpiece of the eviction process that it ordered in the case, and, by doing so, managed to strengthen the residents’ bargaining position significantly. Liebenberg emphasizes that the Court was “[n]ot content to rely on vague guarantees regarding the nature of the alternative accommodation to be provided at Delft,” and instead “stipulated detailed standards with which the ‘temporary accommodation units’ in Delft had to comply, including the provision of services and facilities.”\(^\text{63}\) The Court also ordered the government to honor its commitment to allocate 70% of low-cost housing at Joe Slovo to the relocated communities.

With that background of settled terms in place, the Court then ordered the government to engage with the residents on the specifics of relocation and included a detailed agenda of the items on which the residents must be consulted. These include specifics such as “the exact time, manner and conditions” of each relocation and “the

\(^{62}\) Brian Ray notes from March 2009 interview with Sandra Liebenberg.
precise temporary residential accommodation units” allocated to each resident.\textsuperscript{64} The Court also retained jurisdiction over the case requiring the parties to report the results of these engagements and also granting explicit permission for any party to seek relief directly from the Court “[s]hould this order not be complied with by any party, or should the order give rise to unseen difficulties . . . .”\textsuperscript{65}

De Vos argues that the detailed engagement order, in particular the range of issues on which the government is required to consult, combined with the Court’s retention of jurisdiction, may be a back-door mechanism for forcing the government to engage with the residents over a revised plan thus creating the policy-development engagement that never occurred.\textsuperscript{66} Liebenberg is less convinced that the decision is a positive one for the residents and has criticized the Court for its “willingness to condone the manifestly inadequate consultation processes” in the case.\textsuperscript{67} Nonetheless, she approves of the greater control the Court is exercising over the engagement process.\textsuperscript{68} Both observations show that, regardless of one’s view of the Court’s decisions on the substantive legal issues, the engagement order in the case represents an important development of the remedy and use in a new context. As I discuss in the following sections, the innovations the Court introduced in this order, in particular a more specific agenda and stronger oversight, represent an important refinements that can make the remedy more effective over time.

\textsuperscript{64} Joe Slovo, \textit{supra} note 3, at paras. 11.3-11.4.  
\textsuperscript{65} \textit{Id.} at para. 18.  
\textsuperscript{66} Constitutionally Speaking, http://constitutionallyspeaking.co.za/?paged=2 (June 14, 2009).  
\textsuperscript{67} Liebenberg Op. Ed., \textit{supra} note 5.  
\textsuperscript{68} \textit{Id.}
III. TOWARDS POLITICAL ENGAGEMENT

The varying degrees of success of the engagement processes in these three cases point towards both limits of engagement and its potential as an innovative remedy. In the following sections I divide engagement into two categories: Litigation engagement—the form that it has taken in the three cases described above—and political engagement—the form that I think the Court hopes will develop and that has the greatest potential for transforming engagement into an effective tool for socioeconomic rights enforcement.

A. Litigation Engagement

Two of the three cases discussed above, Olivia Road and Mamba, illustrate engagement operating during the course of litigation, what I call “Litigation engagement.” Joe Slovo provides a slightly different variation: engagement as remedy-management device in litigation. I group all three together despite this difference because a comparison of the circumstances of each case and the roles the court played in the engagement process provides a basis for improving the effectiveness of this remedy in other litigation contexts.

In Olivia Road engagement worked extraordinarily well; in Mamba it failed completely. Why the difference? Several points are immediately apparent. First, the engagement in Mamba was ordered after the government was already committed to changing the challenged policy, in part because of the injunction issued by the high court. Second, the litigation was far advanced and both sides had already been negotiating as part of that litigation for an extended time and understood the positions and arguments of the other side. Third, the parties had the benefit of two lower-court orders, one of which favored the residents and the other the government.
The *Mamba* situation was quite different. The Gauteng government was firmly committed to closure and had already moved forward with implementing that policy. The refugees were forced to bring an emergency application, and the only lower court review resulted in cursory two-page order that did not seriously address the issues raised. Finally, the engagement order was sufficiently ambiguous that the government could interpret it conservatively.

These differences suggest several elements that are important for litigation engagements to succeed. First, courts must view engagement as an iterative process and actively manage that process. Where the parties fail to reach agreement, the public-reporting requirement will create a record that the court can assess for both substantive progress on the issues and also party compliance with the obligation to engage meaningfully. The court can then decide—as happened in *Mamba*—whether further engagement is likely to resolve any of the outstanding issues. The court can also consider changing the terms of the engagement. The range of options are limitless but might include, for example, appointing a mediator or ordering the inclusion (or even removal) of interested groups from the process.

The engagement order in *Joe Slovo* offers some useful examples of the kind of control a court might exercise over the process in a litigation engagement to improve the prospects for success. The order included an agenda for the engagement that specified seven issues for discussion. 69 Among other things, the parties were required to decide “the exact time, manner and conditions [of relocation]” and “the precise temporary residential accommodation units” for relocation. 70 While it would not be possible in a

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69 *Joe Slovo*, *supra* note 3, at paras. 11-11.7.
70 *Id.* at paras. 11.2-11.3.
litigation engagement where the primary issues like whether relocation will occur for a
court to structure the engagement agenda with the same degree of specificity as in Joe
Slovo, it is easy to imagine a court controlling the engagement agenda in a similar fashion
by listing the issues the parties must address and then requiring them to report back on
each.

The court may also determine that some issues are not susceptible to further
engagement and that definitive resolution of them would enhance the prospect for
resolution of other issues in the case through engagement. For example, in Mamba, the
Court could have held that closure of the camps required a reintegration plan but ordered
engagement to determine the details of such a plan. Doing so would have prevented
closure before engagement and created the kind of pressure to change policy that the high
court injunction did in Olivia Road.

Joe Slovo again provides some examples of this sort of increased court control.
As Liebenberg notes, the Court was unwilling to trust the government with the details of
the relocation to Delft and therefore, established specific terms in the order while using
engagement to determine other details. 71 This kind of partial determination of the
substantive issues can break a logjam in negotiations and also alter the bargaining
positions of the parties.

Combining engagement with partial determination of substantive legal issues also
answers the concern raised by the residents in Joe Slovo, that parties sometimes have the
right to a definitive court judgment on a controlling issue in the case. Taken as a whole,
the Joe Slovo decision is really an example of the court using engagement to give back
parties control over policy details after deciding the substantive issues.

Taking this more active role will be particularly important where, as in *Mamba*, the government is firmly committed to the challenged policy. In a less fluid situation, it is also possible for a court to signal the parties during the hearing on its preliminary assessment on the merits of a particular issue without definitively resolving the issue before ordering further engagement. This can have a similar effect in altering the bargaining position of each side while still leaving the broadest range of options open for engagement.

Second, courts must be willing to impose sanctions on parties who fail to meaningfully engage. In *Mamba* the Court should have retained more direct control after ordering engagement to ensure compliance with the process. Although plainly correct when considering the plight of the refugees’ involved in the case, the refugees’ decision not to persist with the appeal eliminated the possibility for the Court to impose sanctions on the government for its failure to meaningfully engage. For litigation engagements to succeed, courts must be willing to impose sanctions for procedural failures like the one in *Mamba*. The Court recognized this in *Olivia Road* when it required a record of engagement efforts by municipalities and emphasized that “[t]he absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order.”72

The result in *Olivia Road* demonstrates that this kind of repeated engagement with active court management and the possibility of sanctions for failing to engage can make the process more effective. The Constitutional Court recognized this in the judgment noting that “[t]he deciding factor in this case in my view was that engagement was

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72 Olivia Road, *supra* note 1, at para. 21.
ordered by this Court, and the parties had been asked to report back on the process while
the proceedings were pending before it.”

This iterative process also puts courts in a better position to make substantive
policy decisions where engagement fails. The public record created through these
engagements will give the court the benefit of detailed proposals and justifications from
each side and also an account of how positions changed during the course of the
engagement. In addition, once this process has developed over time, courts will also
have the benefit of records of other engagements and can consider the similarities and
differences of this particular situation.

Finally, when ordering engagement in the context of an ongoing dispute courts, at
least in the short term, should be more willing to enjoin the challenged activity and retain
supervisory jurisdiction to ensure the process works. This is exactly what the court did in
Joe Slovo, and, although the results of that increased control are not yet clear, it is
plausible that the Court took these steps in recognition that the result in Mamba was
likely due in part to the lack of more direct court management. These examples of
increased agenda control, more direct management and an increased willingness to
impose sanctions, all represent potentially important innovations in the engagement
process. They should send a message to lower courts that they must do more than merely
reflexively order engagement and instead carefully consider how to structure the process
in each case.

73 Id. at para 30.
74 See id. (noting that, in the case of a court-imposed remedy following deliberation “[t]he court’s remedial
decision will be informed by the data, diversity of perspective and reasoning produced by the
deliberations.”).
75 Joe Slovo, supra note 3, at paras. 16, 21.
Increasing court control over the process, imposing sanctions for failures to engage and the willingness to order temporary injunctions during engagement should all enhance the effectiveness of the remedy but come at the cost of diminishing the flexibility of the process. The characteristics just described will turn what at this point looks like a novel innovation into something much more like the standard role courts have taken for decades in the U.S. in large structural-reform cases.\(^76\)

Mark Tushnet has described the kind of litigation engagement represented by *Olivia Road* and *Mamba*—a court-ordered and structured negotiation among affected parties—as a type of “weak-form” review.\(^77\) Weak-form review has the advantage of making judicial review more democratic by incorporating the views of the political branches in the interpretation of constitutional rights.\(^78\) Remedies like engagement rely on the political branches and citizens themselves not courts to develop the terms of the remedy. This transforms the process of constitutional enforcement into something that looks more like a political than a judicial process while still retaining a role for courts ensuring that constitutional values are enforced.

To retain these benefits of engagement in a litigation setting while still assuming sufficient control to make the remedy work, courts must strike a balance as they manage the process and decide how much control to assume at each point. The flexibility inherent in engagement will allow each judge to adjust the level of control they assume at

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\(^{77}\) See MARK V. TUSHNET, WEAK COURTS, STRONG RIGHTS, JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 248 (2008) ("[A]nother characteristic [of weak-form review] might be judicial encouragement of negotiations among affected parties over the contours of a more detailed plan, which the courts might ratify rather than develop independently.").

\(^{78}\) Id. at 228 and 264 ("[W]eak-form judicial review respects the right, grounded in democratic theory, for majorities to prevail ...").
different points in the case and the possibility of repeated engagements offers opportunities to refine the process both within each case and across cases over time.

In spite of this flexibility, it is likely that litigation engagements will turn out to be the least interesting and probably least important form of engagement. Under the right circumstances and with careful and creative management of the process, successes like Olivia Road are possible, but once litigation starts often it will be difficult for courts to create the right mix of incentives for the parties to reach the kind of agreement that resulted from the Olivia Road engagement.

Litigation engagements also run the greatest risk depriving the parties of their right to have a court decide important legal issues. This concern was raised directly by the amici in the Joe Slovo case.

Perhaps more importantly, the ultimate result in Joe Slovo, like the Mamba decision highlights the risk in relying exclusively on this kind of indirect remedy without ever developing the substantive requirements of section 26 directly. Mark Tushnet (citing Cass Sunstein’s discussion of constitutional development in post-Soviet countries) argues that “[c]oupling strong rights with weak remedies, particularly when those remedies are rarely deployed . . .may be a formula for producing cynicism about the constitution.” Each of these cases were viewed by many as important opportunities for the Court to develop the substantive requirements of section 26 substantial. The success of engagement in Olivia Road showed that engagement might succeed in getting parties and the political branches to do this themselves. But the critical reaction to the Court’s approval of the evictions in Joe Slovo and the patent failure of engagement in Mamba

79 TUSHNET, WEAK COURTS, supra note 77, at 252.
show that engagement’s success will depend on the Court occasionally making substantive determinations about what section 26 and these other rights requires.

B. Political Engagement

In *Olivia Road* the Court emphasized to work effectively “engagement [should ordinarily] take place before litigation commences unless it is not possible to do so because of urgency or some other compelling reason.” I call this form of engagement “political engagement.” Extending engagement beyond litigation and turning it into an administrative requirement offers the greatest potential for making the remedy a meaningful tool for implementing section 26 and other socioeconomic rights.

Although it first called for political engagement in *Olivia Road*, beyond the broad outlines described above, the Court did not detail what this kind of engagement should look like. At several points in his opinion in *Joe Slovo*, Justice Sachs began describing some of features of political engagement that provide at least starting points for articulating the requirements for this use of engagement. First, Sachs praised the commitment in the Breaking New Ground Policy (BNG) to “a reinvigorated contract with the people and partner organizations for the achievement of sustainable human settlements” but then went on to criticize the authorities’ failure to implement that commitment by involving citizens in the planning process.

In a footnote, Sachs explained that political engagement must always include affected citizens as genuine partners, not mere recipients of state aid. Sachs warned that the BNG’s emphasis on “mobilizing” communities “risks treating the communities as recipients of state largesse to be informed of benefits they are about to receive rather than

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80 *Olivia Road*, *supra* note 1, at para. ___.
81 *Joe Slovo*, *supra* note 3, at para. 378 (Sachs, J).
as active partners engaged with the authorities in developing programmes and finding solutions . . . .”

Sachs went on to identify several specific problems with the engagements that did occur as the development process progressed. First, he noted the lack of a clear chain of command among the different governmental entities involved: “There were simply too many rather than too few protagonists on the side of the authorities. At different stages, the occupants had to engage with national and then provincial and finally with local entities.” Second, he cited the shifting and, at times competing policy objectives of the different players that confused the residents and led to their sense that the government had broken its promises about the availability of low-cost housing.

Finally, Sachs emphasized the backstop role of the courts in ensuring that political engagements live up to the requirements of the Constitution and implementing legislation, like the PIE. Sachs described section 26 and the PIE as providing a “safety net” because “[u]ltimately, no resident could be compelled to leave Joe Slovo except in terms of a court order . . . .” Sachs later emphasized that the court’s role in reviewing the process was not limited to administrative review but instead, a court “would be hearing the matter de novo (from scratch), and making up its own mind whether the justice and equity requirements of PIE had been met.” This would involve “consider[ing] all relevant circumstances and giv[ing] a full hearing to the occupiers.”

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82 Id. at note 49 (Sachs, J).
83 Id. at para. 379 (Sachs, J).
84 Id.
85 Id. at para. 382 (Sachs, J).
86 Id. at para. 393 (Sachs, J).
87 Id.
Joe Slovo confirms the somewhat ambiguous message in \textit{Olivia Road} that the Court expects government at all levels to build engagement into the policy development process. Together these cases establish the broad contours of political engagement. Affected citizens must be treated as partners, not aid recipients: Authorities must consult with relevant civil society organizations, who, in turn are to act as facilitators of this process.

Political engagement also requires considerable coordination and administrative planning by the government. Some kind of employee training program for engagement is necessary. Where multiple governmental entities are involved, they must coordinate with each other in the engagement. Finally, authorities must establish a system for creating and preserving a record of each engagement.

Courts themselves must also develop procedures for evaluating the engagement process for compliance with these requirements. And, when an engagement fails and the parties resort to litigation, courts must be prepared to enforce the engagement requirements through sanctions.

These broad contours firmly establish that political engagement is now a constitutional requirement and give citizens and civil society groups important leverage to demand a role in policy development, but they leave open many difficult questions about what such engagements would look like. For example, following \textit{Mamba} is the Gauteng government required now to “engage” with the same NGO’s on emergency plans for responses to potential future crises? Should the refugees who remain in South Africa have a voice? If another municipality, like Durban, decides to begin a similar
redevelopment plan, who must it engage with and at what point in the policy-planning process?

The three engagement cases the Court has decided leave these questions open. But these decisions point to two important features of engagement that may begin to answer these questions. First engagement is more than an *ad hoc* alternative dispute resolution mechanism limited to a particular case and imposes long-term systematic obligations on the state. The contours of those obligations will be developed over time as municipalities and other levels of government conduct more engagements and begin to build the engagement infrastructure I discuss below.\(^88\)

Second, NGOs, public-interest lawyers and others have a constitutional role to play in developing the responsibilities that engagement imposes on the state. These cases open the door for groups active on socioeconomic rights issues to argue for a more direct role earlier in the development of policies that implicate these rights. Past experience demonstrates that pressure from these groups is necessary for developing political enforcement mechanisms, and the Court’s engagement decisions should increase the leverage of these groups because authorities know they are now required to consult them when developing socioeconomic policy or risk sanction by the courts.

Up to this point, engagement has developed principally as part of litigation. Interviews with several of the advocates who represented key organizations indicate that, following *Olivia Road*, they have viewed engagement as a tactic for delaying evictions. A standard argument deployed in every eviction case is that the entity seeking eviction has failed to meaningfully engage as required by *Olivia Road* and PIE before attempting

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\(^{88}\) For a discussion of the potential for individual engagements to serve as precedents for the procedural requirements of engagement see Brian Ray, *Extending the Shadow of the Law*, supra note 16.
to evict. This use of engagement creates some prospect for actual resolution if and when a court actually orders the parties to engage. But it is simply a standardized version of the litigation engagements described above and, while offering the benefits of that form of engagement, does not realize the full potential of this innovation.

Charles Epp’s work on the development of what he calls “administrative-rights policies” in the U.S. is useful for considering how engagement could develop beyond a litigation tactic and into an effective tool for political enforcement of socioeconomic rights. Epp argues “[i]n the modern state, rights are empty promises unless they are given life in administrative policies and practices.” He has documented a shift in a range of areas in which “U.S. administrative governance became significantly, even dramatically more rights focused; the rights at the heart of the change became institutionalized and integrated into government agencies in substantial administrative depth.”

Epp describes the “dominant theoretical explanation of administrative-rights policies [as one] that views the policies as the expression of institutional models developed in the face of ambiguous threats from the legal environment, particularly threats of legal liability.” He argues that this model is incomplete, however. Drawing on the work of Mark Galanter and his own empirical studies of the perceptions about litigation of key administrators, Epp argues for those threats to result in administrative change, they must, on the one hand, be supported by the kind of resources, organization and long-term planning, that Galanter argues have permitted the “Haves” to succeed in

89 Brian Ray, notes from March 2009 interview with Adrian __
91 Id.
92 Id. at 43.
influencing administrative policy over time.\textsuperscript{93} Epp argues that have-nots can succeed in institutionalizing rights-policies at the administrative level in the same way as the “Haves” provided that they acquire resources and develop similar, long-term strategies “aimed at ‘playing for the rules,’ rather than aiming only for short-term success in the case at hand.”\textsuperscript{94}

In addition, however, Epp notes that litigation itself is merely a catalyst for the more influential process of developing forward-looking, defensive policies and actions to minimize these threats. This has three dimensions. First these policies typically involve increased attention to the legal dimensions of policies represented by the addition of lawyers or legal experts in policy discussions.\textsuperscript{95} Second, they result in what Epp calls the “systematization of procedures.”\textsuperscript{96} This includes procedures for identifying and remedying potential violations and also procedures for consistently investigating and resolving claims that actually arise.\textsuperscript{97} Third, this forward-looking response involves increased training regarding the legal responsibilities of each employee.\textsuperscript{98} Epp captures all three dimensions and their relationship to the threat of litigation in a quote from one administrador: “‘Responding to the whole litigation area is like a comprehensive program: you need a comprehensive policy that covers everything, from getting good legal counsel, to planning for known risks, to training employees, to insurance coverage, to being responsive to citizen complaints.’”\textsuperscript{99}

\textsuperscript{93} Id. at 44 (citing Marc Galanter, \textit{Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change}, 9 L. & SOC’Y REV. 95 (1994)).
\textsuperscript{94} Id. at 44.
\textsuperscript{95} Epp, \textit{supra} note 90, at 49-50.
\textsuperscript{96} Id. at 50.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
What I have called political engagement is actually a process that the Court hopes will result in the kind of administrative reform described by Epp. Recognizing the limitations of any single judgment in achieving systematic change, as well as the practical problems inherent in court control over complicated policies and programs, the Court developed engagement as a mechanism for making socioeconomic rights enforcement a principally political, rather than legal, effort. Epp’s work suggests that the Court’s focus on administrative enforcement is appropriate and could result in a genuine shift towards rights-sensitive policies. Several aspects of the remedy also reflect Epp’s emphasis on the need for the pressure by organized interest groups backed by the threat of legal sanctions to generate change at the administrative level.

First, the Court’s requirement in Olivia Road that authorities must include civil society organizations in the engagement process recognizes the key role that repeat players can play in the policy development. After Olivia Road, these groups now have a constitutionally sanctioned role to play that should give them leverage to insist on consultation relatively early in planning processes. These advocacy groups will have broader perspectives and will understand how the results of these individual negotiations may affect the broader policy landscape. More importantly, these groups have the resources and staying power to “play for rules” that Epp emphasizes is key to having an effect on policy. Epp notes that in his interviews “[r]espondents universally

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100 For a more general discussion of the Court’s emphasis on political enforcement of socioeconomic rights, see Brian Ray, Policentrism, Political Mobilization and the Promise of Socioeconomic Rights, __ Stanford J. Int’l L. ___ (2009).
101 Epp, supra note 90.
recognized the significance of the relative organizational ‘staying power’ (as one put it) of a litigant or potential litigant.”

Second, the engagement requirement itself is designed as a process for creating this legal pressure by organized interest groups. In addition to giving these groups a seat at the policy table, by requiring authorities to engage in a systematic manner during any long-term planning process, the Court has created a procedural requirement for forcing government to pay attention to rights claims outside of litigation. When starting any planning process, authorities must now incorporate engagement into that process and consider the likely claims that affected citizens and their representatives might raise. The Court’s threat that a failure to engage meaningfully in the process may itself be sufficient for a court to deny a government’s request to enforce a policy—even where the policy itself is otherwise unobjectionable—is a powerful incentive for authorities to take those claims seriously. The public-reporting requirement reinforces that threat by creating a record that a court can review for procedural compliance.

The Court’s requirement that government must treat engagement as a systematic requirement should result in the creation of standardized processes that Epp identified as key to the development of administrative-rights policies in the U.S. Following these three cases, authorities must develop structured, long-term approaches to engagement and build plans for engagement from the start of any redevelopment process. This forces those municipalities to pay consistent attention to the requirements of section 26 and establish processes for identifying and resolving potential violations ahead of time as well as for dealing with citizen claims in the engagement itself.

102 *Id.* at 48.
Thus far I have described engagements effects on government as primarily defensive. But the systematization that Epp describes also has potential benefits for government by giving authorities control over when to engage and under what circumstances. As I have explained elsewhere, the Olivia Road situation presents a useful example of this effect.\(^{103}\) If the City takes seriously the obligations the Court has described, it should now incorporate a structured engagement review process into the inner-city redevelopment plan. This plan will force the City to decide whether a particular building or set of buildings require redevelopment and assess the potential cost of engaging with the residents in light of the benefits it was required to provide the residents in Olivia Road. This permits the City to take control over what interventions to make in light of its overall budget and policy priorities.

Finally, the Court has explicitly called for government to begin incorporating the training processes that Epp identified as having the most significant effect in developing administrative-rights policies.\(^{104}\)

Transforming engagement into a political tool, however, will require creative and persistent effort by the groups who have built the foundations for it through litigation in these and other cases. As Epp emphasizes, change at the administrative level requires substantial resources and “staying power” to become repeat players that capture the attention of policymakers throughout the administrative apparatus.\(^{105}\)

The Court’s engagement decisions provide three important aids that effort. First, they acknowledge a constitutional role for civil society organizations that those

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\(^{103}\) See Brian Ray, Extending the Shadow of the Law, * supra* note 16.

\(^{104}\) See Epp, * supra* note 90, at 50 (noting that “[e]ven without prodding several [respondents] identified [regularized training] as the most significant effect.”).

\(^{105}\) Id. at 48.
organizations can use to work for recognition outside of litigation and earlier in the policy-development process.

Second, the Court has emphasized that government is constitutionally required to develop administrative structures for engagement. These are precisely the kind of administrative changes Epp attributes to the development of administrative-rights policies. Civil society organizations should use their constitutionally sanctioned role to advocate not only for specific policy changes but also for these kind of generic administrative-system changes—things such as engagement training for employees and the creation of something like an engagement department in key executive-branch agencies.

Finally, these groups should continue to use litigation as a mechanism for developing the political side of engagement, but with increased attention to the need for the structural changes just described. For example, in the next major eviction case, it makes sense to argue not only that the authorities have failed to engage with the residents they seek to evict, but also that this specific failure is the result of a broader lack of compliance with the Court’s orders in *Olivia Road* and *Joe Slovo*. The court could then order engagement both on the specific issues in the case and the administrative changes necessary to provide for meaningful engagement in future cases.

IV. CONCLUSION

Despite their ubiquity in modern constitutions, socioeconomic rights have largely gone unenforced by courts because of the significant institutional-competence and separation-of-powers concerns they raise. Courts are both ill-equipped to deal with the complex policy issues raised by these rights and lack the democratic legitimacy of the
political branches when making the inevitable tradeoffs among competing priorities required when setting socioeconomic policy. The South African Constitutional Court has taken a different approach and in doing so has led the way in developing innovative remedies that both recognize the challenges inherent in enforcing socioeconomic rights while still preserving the ability of courts to play a role in ensuring that these rights are not merely empty promises.

Despite its record of innovation, the critics of the Court charge it with “proceduralizing” these rights; demoting them to a kind of lower-class status among rights, deserving only of a limited review for administrative reasonableness rather than full-blown judicial enforcement. These critics correctly note that—with a few relatively small exceptions—the Court has consistently refused to intervene in substantive policy when enforcing rights.

Engagement is the Court’s latest—and perhaps most promising—innovation in this area. If it remains merely a litigation tool, engagement still offers substantial benefits over traditional litigation but likely will not provide a real answer to the Court’s critics. But, if civil society groups, NGOs and public-interest law firms take up the opportunity that the Court has created by using engagement as a judicially enforceable tool demand a voice and a role in policy development, engagement holds real promise as an effective mechanism for enforcing these rights.