THE RIGHT TO HOUSING IN SOUTH AFRICA: AN EVOLVING JURISPRUDENCE

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This Article focuses on recent South African constitutional and statutory jurisprudence regarding the right to housing, and attempts to analyze both its transformative possibilities and its doctrinal limitations. The South African Constitutional Court's housing rights jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution, with eviction cases having been a particular focus of the Constitutional Court. I address three aspects of major recent South African cases relating to the right to housing: the concept of judicially required "meaningful engagement" between government entities and individuals threatened with eviction, the prohibition of unfair practices by landlords and tenants under the Rental Housing Act 50 of 1999, and developments in the concept of just and equitable eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Housing Act 19 of 1998. In each context, I first describe the important ways in which this jurisprudence has benefited the poor and then present a critical perspective identifying both issues of concern and what might be called "unintended consequences." I conclude by arguing that while the universality and moral force of human rights discourse assists in giving meaning and content to housing rights by exposing the social construction of poverty and by shifting the focus from individual fault and dependency to society's responsibility, human rights discourse alone provides limited analytical assistance in addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality.

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I. INTRODUCTION

This Article focuses on recent South African constitutional and statutory jurisprudence regarding the right to housing, attempting to analyze both its transformative possibilities and its doctrinal limitations.1 In 1996, South Africans adopted what has been called a “transformative” constitution2 that includes in its Bill of

1. There is, of course, rich jurisprudence in other countries of the Global South regarding social and economic rights, particularly in Colombia, Argentina and India. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (Colom.) (ordering specific social and economic rights for individuals displaced due to the Colombian civil war), available at http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, “Mendoza, Beatriz S. y otros c. Estado Nacional y otros / daños y perjuicios,” Jurisprudencia Argentina [J.A.] (2008-III-278) (Arg.) (ordering relief related to the contamination of the Matanza-Riachuelo River, which had resulted in massive violations of health and environmental rights for several million people who live alongside or near the river); see generally Human Rights Law Network, Right To Food (Suresh Nautiyal ed., 4th ed., 2009) (discussing People’s Union for Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 and containing all orders of the Indian Supreme Court between 2001-2009 regarding food distribution).

2. Discussing the South African Constitution, Karl Klare first used the concept of “transformative constitutionalism,” defined as:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase “reform,” but something
Rights a broad spectrum of social and economic rights. The Constitution expressly obliges the government to “promote and fulfil” these rights, and mandates that every court, tribunal and forum must, when interpreting the Bill of Rights, “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom” and, when interpreting legislation and when developing common or customary law, “promote the spirit, purport and objects of the Bill of Rights.” While important social and economic rights cases have arisen in many fields, the greatest progress has been made with respect to the right of access to adequate housing. This Article focuses on recent constitutional and statutory developments regarding the right to housing, seeking to identify developments that reveal the transformative possibilities of rights adjudication but also identifying limiting factors and problems. By “transformative possibilities,” I mean the capacity of social and economic rights adjudication to move the law in the short of or different from “revolution” in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the “private sphere.”

Karl Klare, Legal Culture and Transformative Constitutionalism, 14 SAJHR 1, 150 (1998).

Justices of the Constitutional Court have frequently opined that the South African Constitution is transformative in nature. For example, Justice Kate O’Regan has stated: “[T]he Constitutional Court has emphasised on many occasions [that] our Constitution is a document committed to social transformation.” Mkontwana v. Nelson Mandela Metro. Municipality 2005 (1) SA 530 (CC) at 565 para. 81 (S. Afr.) (footnote and citations omitted). Chief Justice Arthur Chaskalson as he then was, stated that “a commitment . . . to transform society . . . lies at the heart of our new constitutional order.” Soobramoney v. Minister of Health (KwaZulu-Natal) 1998 (1) SA 765 (CC) at 771 para. 8 (S. Afr.). And in delivering the Prestige Lecture at Stellenbosch University in 2006, Chief Justice Pius Langa remarked that “[b]oth the Constitutional Court and other courts view the Constitution as transformative . . . . It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.” Pius Langa, Chief Justice, Prestige Lecture at Stellenbosch University: Transformative Constitutionalism (Oct. 9, 2006).

3. For example, in addition to the right to access to housing, the South African Constitution also provides for the right to access to health care, food, water, and social security, albeit within progressive realization, and the right to education, including adult basic education. S. Afr. Const., 1996 §§ 26, 27, 29.

direction of social justice, open space for the poor and excluded groups to fight for access to social goods, and encourage political inclusion and grassroots participation in fashioning social policy. In this Article, I focus on recent developments in housing litigation in South Africa, particularly at the level of the Constitutional Court.

A comprehensive discussion of South African jurisprudence regarding the right to housing is beyond the scope of this Article. Rather this Article captures my remarks at the symposium, “Bringing Economic and Social Rights Home: The Right to Adequate Housing in the U.S.,” at which I was asked to address recent right to housing developments in South Africa that might provide additional arguments that would assist U.S. advocates in advancing their work and strategies.

The South African Constitutional Court’s housing rights jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution. The Court’s extensive attention to housing rights is partly explained by the profound trauma of forced removals and evictions during the apartheid era. While apartheid as a political system is associated with the period from 1948 to 1994, the framework of race-based land occupation was entrenched long before 1948. Harmful effects of this

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legacy endure in the new South Africa, and the maldistribution of property continues to be a major source of political and legal contention. The ANC-led government has been criticized by grassroots movements for the slow pace of its reform efforts to address this problem. The jurisprudence regarding the right to housing has developed within this social and political context.

Within the housing field, eviction cases have been a particular focus of the Constitutional Court’s developing social and economic jurisprudence. One factor is the extreme crisis of housing associated with urbanization. In addition, eviction cases involve the threat of an immediate harm to identified individuals. Therefore grassroots mobilization is usually easier to arouse in this context than in cases regarding day-to-day poverty and lack of subsistence provision. Finally, a number of South African non-governmental organizations have focused on evictions, including the Centre for Applied Legal Studies, the Legal Resources Centre, and the Socio-Economic Rights Institute of South Africa.

While the issue of whether social and economic rights should be included in the South African Constitution was highly debated at the time of the Constitution’s drafting, the 1996 South African Constitution ultimately incorporated several specific social and economic rights. But the state’s obligations regarding social and economic rights were largely qualified by the phrases “reasonable legislative and other measures,” “progressive realization,” and “available resources.” As a result, litigants have had much more

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success invoking the protection of a social and economic right when it is directly threatened or infringed by negative conduct (such as an unfair eviction). The Constitutional Court in Government of the Republic of South Africa v. Grootboom found that the Constitution incorporated “at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”\textsuperscript{16} However, the constitutional adequacy of the government’s programs to fulfill its affirmative obligations to give effect to social and economic rights is tested under a broad and deferential “reasonableness review” standard.\textsuperscript{17} An individual is not ordinarily entitled to immediate delivery of any particular social good.\textsuperscript{18}

In Part II of this Article, I set forth the South African constitutional provisions and statutes that I will address in my discussion of the evolving South African housing rights jurisprudence. I then address three aspects of major recent South African cases relating to the right to housing. In Part III, I address the concept of judicially required “meaningful engagement” between government entities and individuals threatened with eviction, which may lead to alternative accommodations or in situ housing renovations that negate the need for eviction. In Part IV, I discuss the prohibition of unfair practices by landlords and tenants under the Rental Housing Act 50 of 1999, and the decision of the Constitutional Court not to address such issues by developing the common law as provided in Section 39(2) of the Constitution. In Part V, I discuss recent developments in the concept of just and equitable eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Housing Act 19 of 1998.

Throughout, I note that while many of the evolving doctrines promise some positive developments for tenants, several troubling trends must be noted as well. In each Part, I first describe the important ways in which this jurisprudence has benefited the poor and then present a critical perspective identifying both issues of concern and what might be called “unintended consequences.” I

\textsuperscript{16} Grootboom 2001 (1) SA at 66 para. 34. See also Jaftha v. Schoeman 2005 (2) SA 140 (CC) (S. Afr.) (holding that a creditor seeking to enforce a trivial loan may not do so through the normal procedure of attaching the debtor’s property if the result is that a poor person will be evicted from her residence).

\textsuperscript{17} Soobramoney 1998 (1) SA at 765. See Williams, Comparative, supra note 9, for a juxtaposition of the U.S. individual statutory social welfare entitlement and South African constitutional reasonableness review.

\textsuperscript{18} Soobramoney 1998 (1) SA at 765.
conclude by arguing that while the universality and moral force of human rights discourse assists in giving meaning and content to housing rights by exposing the social construction of poverty and by shifting the focus from individual fault and dependency to society’s responsibility, human rights discourse on its own provides limited analytical assistance when addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. South African Constitutional Provisions

Section 26 of the 1996 South African Constitution contains three sub-sections relating to housing. Sections 26(1) and (2) provide for the right of access to adequate housing, albeit with important qualifications. One of the earliest South African Constitutional Court’s social and economic rights cases, *Grootboom*, interpreted these provisions. In *Grootboom*, a group of homeless adults and children, who had nowhere else to go to escape the mid-winter cold, congregated on a sports field, but could not erect adequate shelters because their building materials had been burned and bulldozed in a previous eviction that was reminiscent of apartheid-era evictions. They brought an emergency action against the government seeking temporary shelter until they could obtain permanent accommodation. The Constitutional Court found a violation of the right of access to adequate housing, holding that Section 26 obliges the state not only to devise and implement a coherent, co-ordinated housing program, but to provide such program for those in most desperate need. The Court held that since existing housing policy and programs did not make specific provision for those in extreme distress such as the

19. Section 26 of the Constitution provides:
   (1) Everyone has the right to have access to adequate housing.
   (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
   (3) 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.


21. *Id.* at 68 paras. 40–41.
claimants, the government had failed to take constitutionally required, reasonable measures to progressively realize the right to housing.\footnote{Id. at 69, 78, 79, 87 paras. 43–44, 64, 66, 68, 99.}

The Court entered a declaratory order that the various levels of government “devis[e], fund, implement and supervise measures to provide relief to those in desperate need.”\footnote{Id. at 86 para. 96.} While the specific applicants in the 

*Grootboom* case did not achieve the housing they sought in the litigation (indeed, the named applicant, Ms. Grootboom, died without ever receiving permanent housing),\footnote{The fact that the 

*Grootboom* plaintiffs did not receive adequate housing resulted largely from an inadequate settlement agreement entered into before the Constitutional Court’s decision in the case. Id. at 85 para. 91.} the judgment had a major impact on housing policy in South Africa. Among other things, it led to a new program, the 2003 Housing Assistance in Emergency Situations, incorporated into Chapter 12 of the National Housing Code in 2004, establishing a program for emergency housing and upgrading of informal settlements.\footnote{Kate Tissington, Socio-Economic Rights Institute of South Africa, A Resource Guide to Housing in South Africa 1994–2010: Legislation, Policy, Programmes and Practice 44 (2011) ("Grootboom thus gave rise to a right to emergency housing and a means for its enforcement, at least through the application of the Emergency Housing Programme."); see generally Malcolm Langford, *Housing Rights Litigation: Grootboom and Beyond*, in Socio-Economic Rights in South Africa: Symbols or Substance? (Malcolm Langford et al. eds., 2014) (assessing the impact of Grootboom achieving improved housing rights).} However, much of the South African Constitutional Court’s jurisprudence since 

*Grootboom* has focused on the third sub-section of Section 26 of the Constitution, which states that “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.” This provision will be a primary focus of this Article.

B. Relevant South African Statutes

The two relevant housing statutes that the Constitutional Court has relied on in conjunction with Section 26(3) of the constitution most recently are the Rental Housing Act\footnote{Rental Housing Act 50 of 1999 (S.Afr.).} and the

The Preamble to the Rental Housing Act states that “there is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation,” and to “introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties.”28 The Act empowers the Member of the Executive Council responsible for housing in each province to create a Rental Housing Tribunal,29 and provides that tenants or landlords “may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice.”30 “Unfair practices” are defined as: “(a) any act or omission by a landlord or tenant in contravention of the Act; or (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant of a landlord.”31 The Act specifically gives the landlord the right to terminate a lease “in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease.”32

Prior to the adoption of the PIE Act, the apartheid-era Prevention of Illegal Squatting Act (PISA)33 rendered unlawful occupiers subject both to summary eviction and criminal prosecution. Even if individuals had lived their entire lives on the land occupied, a new owner could withdraw permission to remain, and the occupiers would be quickly and forcibly removed.34 PISA was an integral part of the residential segregation that was a “cornerstone of the apartheid policy.”35

The PIE Act was expressly passed to give effect to Section 26(3) of the Constitution.36 It repealed PISA and decriminalized squatting, and it also made the eviction process subject to

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28. Rental Housing Act 50 of 1999, Preamble (S.Afr.).
29. Id. § 7.
30. Id. § 13(1).
31. Id. § 1.
32. Id. § 4(5)(c).
33. Prevention of Illegal Squatting Act 52 of 1951 (S.Afr.).
34. Port Elizabeth Municipality v. Various Occupiers 2005 (1) SA 217 (CC) at 222 para. 8 (S. Afr.).
35. Id. at 222 para. 9.
36. Id. at 224 para. 11.
requirements designed to ensure that homeless people would be treated with dignity while they were awaiting access to new housing development programs. \(^{37}\) It contains two central operative provisions: Section 4 governs evictions brought by owners of land, and Section 6 governs evictions brought by organs of state. Both require courts asked to order an eviction to consider whether it would be “just and equitable” to grant the eviction. Section 4 differentiates between occupiers who have occupied the land for less than or more than six months, but in both cases requires the court to consider “all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.”\(^ {38}\) Where the occupier has occupied the land for more than six months, the Act also requires the court to consider whether “land has been made available or can reasonably be made available by a municipality or other organ of state or other land owner for the relocation of the unlawful occupier.”\(^ {39}\) The distinction that appears in the text of Section 4 between those living in housing before and after six months has been eroded in Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd.\(^ {40}\) and The Occupiers, Shulana Court,

\(^{37}\) Id. at 224 para. 12.

\(^{38}\) Section 4 provides:

(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.


\(^{39}\) Id. § 4(7).

\(^{40}\) Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd. 2012 (2) SA 337 (CC) (S. Afr.).
Initially, the Supreme Court of Appeal in *Shulana Court* found that since a court considering an eviction under Section 4(6) must consider all “relevant circumstances,” “where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it.” In *Mooiplaats*, Justice Yacoob went further:

While this distinction [between Sections 4(6) and 4(7)] is important, I do not think it is decisive to the justice-and-equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all the relevant circumstances. In an enquiry of this kind a court should determine what the relevant circumstances are. Close to 200 families would have been evicted and in all probability rendered homeless consequent upon the order of the High Court. In the face of this consequence the question whether the City was reasonably capable of providing alternative land or housing was of crucial importance.

Section 6 sets out factors to be considered in deciding whether granting an eviction is just and equitable, although these factors are

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41. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v. Steele* 2010 (9) BCLR 911 (SCA) (S. Afr.).
42. *Id.* at 917 para. 13.
43. *Mooiplaats* 2012 (2) SA at 344 para. 16.
44. Section 6 provides:

1. An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or (b) it is in the public interest to grant such an order.
2. For the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general. (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his or her family have resided on the land in question; and (c) the
The Right to Housing in South Africa

III. MEANINGFUL ENGAGEMENT AND DEMOCRACY

As leading South African legal scholar Danie Brand has argued, the courts must heed a “constitutional imperative . . . through their work in socio-economic rights cases . . . to advance . . . the kind of democracy (a thick, or empowered conception of democracy) envisaged in the South African Constitution.”46 Brand and other scholars have argued, by extension, that litigants and advocacy groups should understand and assess their social and economic rights litigation not just in terms of gaining access to social goods but also as a practice for broadening democracy and empowering people at a grassroots level.47 A very promising development along these lines is the doctrine of meaningful engagement which has significant potential both for popular empowerment and for improving public administration by bringing “local knowledge” into the decision making process. As the Constitutional Court articulated in Port Elizabeth Municipality v Various Occupiers in 2004, “one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest

availability to the unlawful occupier of suitable alternative accommodation or land.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, § 6(1)-(3) (S.Afr.).

45.  Port Elizabeth Municipality v. Various Occupiers 2005 (1) SA 217 (CC) at 234–35 para. 30 (S. Afr.).


47.  See generally id. at 630–37 (suggesting approaches courts should adopt, and thus by implication that litigants should advocate for such approaches); see also Danie Brand, Courts, Socio-economic Rights and Transformative Politics 117–18 (Mar. 31, 2009) (unpublished doctoral dissertation, Stellenbosch University) (on file with the author) (concluding that courts cannot completely avoid the limiting impact of adjudication on transformative politics, and should aim to remain aware of their impact instead); Karl Klare, Concluding Reflections: Legal Activism After Poverty Has Been Declared Unconstitutional, 22 Stellenbosch L. Rev. 865 (2011); Henk Botha, Representing The Poor: Law, Poverty and Democracy, 22 Stellenbosch L. Rev. 521 (2011).
endeavour to find mutually acceptable solutions.” The Court noted that such a process could function to reduce expenses of litigation, avoid tensions, narrow issues in dispute, and enable parties to relate in a “pragmatic and sensible” fashion.

Here I focus on three of the several South African Constitutional Court cases that have discussed meaningful engagement: Occupiers of 51 Olivia Road v. City of Johannesburg, Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, and Abahlali baseMjondolo Movement SA v. Premier of the Province of KwaZulu-Natal.

In Occupiers of 51 Olivia Road v. City of Johannesburg, over four hundred occupiers of two buildings in inner city Johannesburg appealed an order authorizing their eviction because the buildings in which they were residing were allegedly unsafe. Two days after the application for leave to appeal was heard, the Constitutional Court issued an order that the city and the applicants “engage with each other meaningfully” in an effort to resolve the differences between the parties “in light of the values of the Constitution” and “to alleviate the plight of the applicants... by making the buildings as safe and as conducive to health as is reasonably practicable.” The City was also ordered to report back to the Court on the results of the engagement. The Court further explained that, although the concept of meaningful engagement had not been directly raised before the Court by the parties, the concept had roots as far back as the Grootboom judgment.

49. Id. at 240 paras. 42–43.
51. Occupiers of 51 Olivia Rd. v. City of Johannesburg 2008 (3) SA 208 (CC) (S. Afr.).
52. Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes 2010 (3) SA 454 (CC) (S. Afr.).
54. Olivia Road 2008 (3) SA at 210 para. 1. These evictions were pursuant to the National Building Regulations and Building Standards Act 103 of 1977 and section 20 of the Health Act 63 of 1977.
55. Olivia Road 2008 (3) SA at 212 para. 5.
56. Id.
57. Gov’t of the Rep.of S. Afr. v. Grootboom 2001 (1) SA 46 (CC) at 84 para. 87 (S. Afr.) “The respondents began to move onto the New Rust land during...”
In *Olivia Road*, building both on *Grootboom* and *Port Elizabeth*, the Constitutional Court began to give more content to the concept. Calling engagement “a two-way process in which the City and those about to become homeless would talk to each other meaningfully,” the Court laid out a list of possible objectives of such engagement, although it also stressed that “[t]here is no closed list.”

It suggested that engagement might be used to determine:

(a) What the consequences of the eviction might be;
(b) Whether the city could help in alleviating those dire consequences;
(c) Whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
(d) Whether the city had any obligations to the occupiers in the prevailing circumstances; and
(e) When and how the city could or would fulfil these obligations.

The Court was aware of power imbalances likely to exist between the parties to meaningful engagement in an eviction context. It recognized that the people about to be evicted were vulnerable and might be unwilling to meaningfully engage due to lack of understanding of the importance of the process. It held that this does not release the municipality from responsibility, but required that the municipality make reasonable efforts to engage. The Court emphasized that “People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the peoples’ claims should preferably facilitate the engagement in every possible way.”

September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would have also thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.”

59. *Id.*
60. *Id.* at 216 para. 15
61. *Id.* The Court’s statement was undoubtedly well intended, although its choice of the words “lack of understanding” to characterize a situation of vulnerability and disempowerment was unfortunate.
62. *Id.* at 217 para. 20.
The engagement between the government and those about to become homeless must be "structured, consistent and careful" and based on the constitutional value of openness rather than secrecy. Further, "a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process" would need to be filed with the court should the municipality proceed with the eviction action in court. Significantly, "the 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."

It is important to place the Olivia Road judgment in its procedural context. The Court noted that meaningful engagement should ordinarily happen before litigation "unless it is not possible or reasonable to do so because of urgency or some other compelling reason." It also emphasized that there had been no effort by the municipality to engage with the people who would become homeless as a result of the eviction prior to the time that the eviction action was brought, even though the municipality must have been aware that the occupiers would become homeless as a result of the eviction. In this case, the Court ordered meaningful engagement after hearing arguments, but before rendering judgment. The Court handed down judgment after the parties had reached a successful comprehensive settlement and submitted it to the Court.

One year later, in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, the Constitutional Court required the three respondents—Thubelisha Homes, the National Minister for Housing and the Minister of Local Government and Housing, Western Cape—to engage meaningfully with a large informal

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63. Id. at 217 para. 19.
64. Id. at 217–18 para. 21.
65. Id.
66. Id.
67. Id. at 219 para. 30.
68. Id. at 215 para. 13.
69. It is important, however, to note that the Constitutional Court may have stepped away from the rigorous meaningful engagement approach evidenced in Olivia Road in the Joe Slovo and Blue Moonlight judgments. Indeed, there has not been a Constitutional Court case since Olivia Road in which the Court adopted the “strong” meaningful engagement prior to evictions approach including the court’s retaining oversight.
70. The eviction was not sought by the City of Cape Town, which owned the property, but rather by Thubelisha Homes Ltd., a public company established by
community faced with eviction that had been instituted to make way for formal housing under the government’s housing development project. Here, unlike in *Olivia Road*, the requirement for meaningful engagement was included in the Court’s judgment upholding the eviction order. Five judgments were written, all of which supported the order prepared by Justice Yacoob. Some judgments found serious fault with the engagement process that took place prior to the litigation in that it was top-down, unstructured, and devoid of mutual understanding. For example, Justice Sachs noted:

> 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. As this Court has made clear, meaningful engagement between the authorities and those who may become homeless as a result of government activity, is vital to the reasonableness of the government activity.

Justice Ngcobo, joined by Justice Sachs and Deputy Chief Justice Moseneke, stated that meaningful engagement involves treating residents with respect and showing care for their dignity. They articulated nine goals of the engagement process in the context of a housing development program that would provide the residents with information about the details, the purpose and the implementation of the program.

71. Subsequently, in other judgments, meaningful engagement has been ordered in cases involving different procedural postures. For example, in *Schubart Park*, residents were removed from a residential complex without an eviction order because the complex was allegedly unsafe. Among other things, the Constitutional Court ordered engagement regarding restoration and return to the Schubart Park residence and alternative accommodation until restoration is complete. *Schubart Park Residents’ Ass’n v. City of Tshwane Metro. Municipality* 2013 (1) SA 323 (CC) at 339 para. 53 (S. Afr.)

72. *Joe Slovo* 2010 (3) SA at 571–72 para. 378. See also Justice Moseneke’s discussion of the lack of formal notice before the urgent eviction application was filed, and how the respondents “did not give the residents of Joe Slovo the courtesy and the respect of meaningful engagement which is a pre-requisite of an eviction order under section 6 of the PIE.” *Id.* at 510 para. 167.

73. *Id.* at 529–30 para. 238.

74. These included: “the purpose of the program, the purpose of the relocation, arrangements for temporary residential units where in-situ
In a much more comprehensive and formal way than it did in the *Olivia Road* case, the Court provided a detailed engagement order which included a range of issues on which the government was required to effectively consult, including detailed standards regarding the nature of the alternative accommodation to be provided. Interestingly, the government parties to the case provided these details after argument but before judgment at the request of the Court.

Deputy Chief Justice Moseneke specifically noted that the Court would retain jurisdiction to supervise the result of the meaningful engagement. Nevertheless, commentators have criticized the judgment as trivializing the devastating impact that the relocation would have had on the residents, reducing their interest to one of mere “convenience.”

It is significant that in the ensuing engagement process, the authorities became convinced that *in-situ* upgrading of the Joe Slovo development is not possible, how and when relocations will take place, the amount of notice to be given before relocation actually takes place, consequences of relocation, including the extent to which the lives of the residents will be disrupted, whether the government will help to alleviate any dire consequences, the criteria for determining who of the residents will be resettled in the area that has been developed, and where those residents who cannot be accommodated in the developed area will be provided with permanent housing.”

75. The temporary residential accommodation unit must:
10.1 be at least 24m² in extent;
10.2 be serviced with tarred toads;
10.3 be individually numbered for purposes of identification;
10.4 have walls constructed with a substance called Nutec;
10.5 have a galvanized iron roof;
10.6 be supplied with electricity through a pre-paid electricity meter;
10.7 be situated within reasonable proximity of a communal ablution facility;
10.8 make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and
10.9 make reasonable provision (which may be communal) for fresh water.

76. *Id.* at 6 para 10.

77. *Id.* at 80 para 139.

settlement (which had been previously proposed by the occupants in their court papers as the appropriate alternative and been rejected by the government parties) was a feasible alternative to eviction. The reason for this decisional shift is unclear—it has been suggested that the government parties, even after proposing the explicit provisions for the relocation, might have decided that it was less expensive to abandon the eviction than to comply with the Constitutional Court order.

The Abahlali judgment, also rendered in 2009, involved a challenge by a grassroots shackdweller movement in Durban to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act of 2007 (Slums Act). In striking down Section 16 of the Act, which required the municipality to commence eviction proceedings against unlawful occupiers if the owner of the land on which the occupiers were residing failed to do so, the Constitutional Court stated:

No evictions [under the PIE Act] should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded in situ; and whether there will be alternative accommodation.

In other words, the Court found that engagement is not “meaningful” if it occurs after the municipality has already decided to begin eviction proceedings, and that relocation should be a last resort only after in situ salvaging had been investigated.

The use of meaningful engagement as a remedy in South Africa should be carefully analyzed and explored by advocates in the

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78. Residents of Joe Slovo Cmty v. Thubelisha Homes 2011 (7) BCLR 723 (CC) at 736–39 para. 30 (S. Afr.).
79. Telephone Interview with Steve Kahanovitz, Lawyer, Legal Resource Centre (Jan. 13, 2014). Kahanovitz was the lawyer for the applicants in Joe Slovo.
81. Abahlali baseMjondolo Movement SA v. Premier of Province of KwaZulu-Natal 2010 (2) BCLR 99 (CC) at 133 para. 114 (S. Afr.).
82. Id. at 119 para. 69, 135 para. 120.
83. Note the related approaches utilized by the Colombian Constitutional Court. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, available at http://www.corteconstitucional.gov.co/relatorias/2004/t-025-04.htm, supra note 1 (where the Court has held public hearings and created a permanent monitoring chamber that provided a forum for
United States. Although the United States obviously does not have a constitutional provision that parallels Section 26(3) of the South African Constitution, nor is there anything akin to the PIE statute, some form of meaningful engagement might be fashioned under U.S. law through courts’ powers to develop equitable remedies. This has the potential to develop collaborative, deliberative decision-making processes that could ultimately empower marginalized populations and enhance democracy.

However, each avenue for creative advocacy must be viewed through a cautionary lens. First, experience shows that, to be effective, a court ordering meaningful engagement must articulate in detail a structure to govern the process, specific goals or questions that need to be addressed, and a mechanism for judicial oversight of the results of the engagement.

Second, as recognized by the Court in *Olivia Road*, a minimum step necessary to address the extreme power imbalances among the stakeholders—the marginalized population, the private developers, and the state entities—is providing the occupiers or similar claimants with substantial expert legal assistance and other expertise. Otherwise, the engagement will be merely a sham and a waste of time, ultimately disempowering the marginalized population.

Finally, the “engagement” between the occupier groups and their lawyers/advocates is as important as the engagement between the occupiers and the other stakeholders. Contrary to the mainstream version of “apolitical lawyering” in which lawyers simply serve as neutral mouthpieces for the interests of their clients, the experience of grassroots movements reveals that lawyers bring their own values into the engagement. Unless careful attention is paid by the movements and their lawyers alike, lawyers’ values can negatively influence, among other things, the advice they give and the representational tactics they choose. Moreover, the process of interaction between lawyer and client constantly generates new
dialogue and debate among state institutions and civil society); Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760-08, available at http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm (where the Court is experimenting with various methods of dialogue and working groups with diverse stakeholder composition).

84. Author’s conversation with Advocate Stuart Wilson. See also Stuart Wilson, *Planning for Inclusion in South Africa: The State’s Duty to Prevent Homelessness and the Potential of “Meaningful Engagement,”* 22(3) Urb. F. 265 (2011) (describing the engagement process in *Olivia Road*).
perceptions of interests. This production of new interests, identities and relations is an inevitable part of the engagement. This can be empowering for both clients and lawyers, but only if the process is accompanied by continuous dialogue, mutual awareness, and criticism. These values influence, among other things, the advice they give and the representational tactics they choose. The process of interaction constantly constructs new interests.

IV. UNFAIR PRACTICES UNDER THE RENTAL HOUSING ACT AND THE COMMON LAW

As noted in Part II.B, the Rental Housing Act regulates the relationships between private landlords and tenants in rental housing, and is intended to expeditiously and at minimum cost protect both parties from unfair practices. *Maphango v. Aengus Lifestyle Properties* involved an attempted eviction of tenants from residential flats in Johannesburg and raised the question of unfair practices between non-state parties, i.e., landlords and tenants. The leases in the case contained two relevant provisions: (1) a clause allowing either the landlord or tenant to terminate the lease on short notice after the first year of occupancy, and (2) a clause limiting the amount by which the rent could be raised from year to year if the tenancies were to continue over a period of years, which was the case in *Maphango*. The landlord attempted to cancel the leases pursuant to the first clause, raise the rents to nearly double what the tenants had been paying—more than allowed in the second clause—and lease the apartments back to the tenants if they were willing to pay the higher rental amount. The tenants filed a complaint before the Gauteng Rental Housing Tribunal—which is, as noted, a body created under the Rental Housing Act—arguing that the landlord’s actions constituted an “unfair practice” within the statute. The Tribunal informed the landlord that it was “attending to this matter,” requested that the landlord “refrain from issuing eviction notices,” convened a mediation hearing that was unsuccessful, and set a date

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for an arbitration hearing. Instead of refraining, the landlord responded by filing an eviction action. The tenants, deciding that they did not have the energy and resources to litigate in both forums, withdrew their complaint before the Tribunal. Among other claims, they contended that the eviction action was unlawful as an “unfair practice” under the Rental Housing Act.

When the landlord’s eviction action reached the Constitutional Court, the Court found that the Rental Housing Act provided that no final judicial action on the landlord’s action for eviction could be ordered before the Tribunal had made its determination both of the “unfair practice” question and of any remedial consequences. In making its ruling, the Court interpreted the Rental Housing Act in light of the Constitution. The Court held that the right of access to adequate housing found in Section 26 “ripples out to private rights when the state itself takes measures to fulfill the right. These may affect private relationships.”

In applying these principles, the Court found that the Rental Housing Act “superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate.” As a result, “where a tenant lodges a complaint about a termination based on a provision in a lease, the Tribunal has the power to rule that the landlord’s action constitutes an unfair practice, even though the termination may be permitted by the lease and the common law.” This “subjects lease contracts and the exercise of contractual right to scrutiny for unfairness in light of both parties’ rights and interests.” The Constitutional Court found that the Tribunal’s determination as to whether the landlords’ termination of the tenants’ leases was an unfair practice would be quite pertinent to a subsequent determination as to whether to grant an eviction under Section 26(3)

89. Id. at 537–538 para. 13–14.
90. Id. at 27 para. 45.
91. Id. at 27 para. 46.
92. Section 39(2) of the South African Constitution provides: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” S. Afr. Const., 1996 § 39(2).
93. Maphango 2012 (3) SA at 544 paras. 33–34.
94. Id. at 551 para. 51.
95. Id. at 552 para. 52.
96. Id. at 552 para. 53.
of the Constitution because the court ruling on the eviction must consider “all the relevant circumstances.”97

But the Court declined to rule on a deeper issue that was argued in the case. Section 39(2) of the South African Constitution requires courts not only to interpret legislation to promote Bill of Rights values, but also to develop the common and customary law so as to promote the goals of the Bill of Rights.98 The Court declined the invitation to rule on whether the common law of contracts, if interpreted to allow an eviction under the circumstances at bar, would be consistent with the spirit and values of the Bill of Rights. More specifically, the Court expressed no view as to whether the common law of contracts should be “developed” pursuant to Section 39(2) to bar enforcement of a terminable-at-will clause used as a device to drastically increase the rent in violation of the spirit of the increase-limitation clause.99

In addition, Acting Justice Zondo, as he then was, joined by Chief Justice Mogoeng and Justice Jafta, authored a disturbing dissenting judgment based on archaic and formalistic contracts thinking which would have allowed the landlord to terminate the lease in violation of the lease’s evident spirit and intent. As articulated in the dissent, the leases were entered into freely and voluntarily with a clause that allowed either the landlord or the tenant to terminate the lease for no reason.100 As such, the landlord should be able to use the lease termination provision to overrule the lease provision setting caps on rental increases.101 Although its rhetoric would have fit in well in the 19th century, the dissent reflects the neo-liberal direction now threatening to derail the development of South African transformative jurisprudence.

The Maphango case provides much from which advocates and scholars in the United States can learn. U.S. housing advocates and scholars need to launch a project of systematically interrogating, challenging, and, to the extent possible, developing the U.S. common law according to such humane principles as we can find in the U.S.

97. Id. at 554 para. 61.
98. Id. at 551 para. 51.
99. Id. at 552 para. 55. For an extensive overview of South African judgments that exemplify the courts’ struggle with the constitutional mandate of Section 39(2) to develop the common law so as to promote bill of rights values, see Dennis M. Davis & Karl Klare, Transformative Constitutionalism and the Common and Customary Law, 26 SAJHR 403 (2010).
100. Maphango 2012 (3) SA at 574–75 paras. 124–27.
101. Id. at 575 para. 127.
and state constitutions. The U.S. Constitution does not have the equivalent of a Section 39(2) as in the South African Constitution, but United States jurisprudence does contain cases such as *New York Times v. Sullivan*,\(^{102}\) which held that common law adjudication (in that case, defamation claims) must be scrutinized in light of the values of the First Amendment to the U.S. Constitution. While the United States is a long way from the transformative potential of a Section 39(2), that does not mean that U.S. advocates should not re-think which tools are available within U.S. jurisprudence to develop the common law in view of equalitarian imperatives located in constitutional and, where applicable, federally preemptive texts.

V. THE “JUST AND EQUITABLE” CLAUSE OF THE PIE ACT

As noted earlier, the PIE Act that repealed and replaced PISA significantly altered the legal framework governing the relationship between private property owners’ and occupants’ rights. Specifically, it requires courts asked to order an eviction to consider whether it would be “just and equitable” to grant the order. Along with *Joe Slovo I*, previously discussed, several cases have interpreted the “just and equitable” provision of the PIE Act in the context of Section 6, which governs evictions brought by organs of state. However, here I discuss recent housing issues in cases involving evictions brought by private landowners that concern the conflict between the constitutional right of access to adequate housing and a private owner’s right to property. I focus on the 2011 judgment in *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties*,\(^ {103}\) which concerned whether and under what circumstances residential tenants slated to be moved in an otherwise lawful eviction are entitled to be afforded temporary, transitional housing before the eviction may take place.

*Blue Moonlight* raised an issue not raised in the *Maphango* judgment. As noted earlier, *Maphango* involved non-state parties—tenants and a private landlord—challenging the validity of the eviction as an unfair practice under the Rental Housing Act—an eviction ultimately held to be invalid. A central part of my analysis of *Maphango* was that the state is always intimately involved when private rights are enforced by courts, and that the failure of the Constitutional Court to interpret the common law of contracts in light

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of “the spirit, purport and objects of the Bill of Rights”\textsuperscript{104} was a missed opportunity to exercise its authority under Section 39(2) of the Constitution so as to promote the goals of the Bill of Rights.

	extit{Blue Moonlight} represents a variation on this theme. The principal respondent in \textit{Blue Moonlight} was an arm of government, the City of Johannesburg, and most of the Court’s analysis concerned the responsibilities and obligations of the state with respect to displaced tenants in a valid eviction. As in \textit{Maphango}, however, the moving force in \textit{Blue Moonlight} was a private developer; the developer’s plans and actions precipitated the situation in which the tenants sought assistance from the state. Although this issue was avoided in the Court’s treatment, the case implicitly but powerfully posed the question as to whether private developers should be called upon to absorb some social dislocation costs attributable to their business, or profit-seeking, activities. In other words, \textit{Blue Moonlight} integrally involved the organs of state in the eviction process as well as private owners.

\textit{Blue Moonlight} builds on the jurisprudence of \textit{President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd.}\textsuperscript{105} In \textit{Modderklip}, about 400 people who had been evicted from the previous site where they had an informal settlement moved onto land that they mistakenly believed was owned by a municipality. In fact, it was privately owned by Modderklip Farm.\textsuperscript{106} Within six months of the initial occupation of the property, Modderklip instituted eviction proceedings in the Johannesburg High Court under Section 4 of the PIE Act. The order was granted, and the settlers were given two months to vacate.\textsuperscript{107} While the case proceeded through its early stages, the informal settlement grew to approximately 40,000 occupiers,\textsuperscript{108} which gives some indication of how desperate the housing situation is in South Africa. The sheriff refused to execute the eviction order without a deposit of 1.8 million Rand (then approximately $220,000) to cover the costs of the eviction.\textsuperscript{109}

\begin{itemize}
  \item[106.] \textit{Id.} at 9, 20 paras. 3, 35.
  \item[107.] \textit{Id.} at 10 para. 7.
  \item[108.] \textit{Id.} at 10 para. 8.
  \item[109.] \textit{Id.} at 11 para. 9.
\end{itemize}
The Constitutional Court found that the land owner's constitutional right of access to courts,110 read with the Constitution’s rule-of-law guarantee,111 had been violated by the state’s failure “to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief” regarding the valid eviction order it had obtained.112 However, the Court also ruled that “the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority,” and that the state must compensate Modderklip for the use of the land by the occupiers during that interim period.113 Because the eviction order itself was not appealed, the Modderklip Court had no occasion in the first instance to discuss whether the eviction was “just and equitable” under the PIE Act.

In the 2011 judgment of Blue Moonlight, 81 adults and five children were occupants of an industrial building in the Johannesburg central business district.114 One child was disabled, two adults were pensioners, and several households were headed by females.115 All of them had lived in the warehouse for more than six months, one of them had lived there since 1976 and another since 1990.116 Their occupation had previously been legal, they had paid rent until either 2004 or 2005, and the current owner (Blue Moonlight Properties) had purchased the building in 2004 knowing that it was occupied.117

Blue Moonlight sought eviction of the occupiers so that it could redevelop the property.118 The occupiers opposed the eviction on the grounds that it would render them homeless, a constitutionally problematic outcome.119 The developers in turn claimed that their

110. “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” S. Afr. Const. 1996 § 34.
113. Id. at 28 para. 68.
114. City of Johannesburg Metro. Municipality v. Blue Moonlight Properties 39 2012 (2) SA 104 (CC) at 108 para. 6 (S. Afr.).
115. Id.
116. Id. at 108 para. 7.
117. Id. at 10, 21 paras. 7–8, 39.
118. Id. at 10, 11–12 paras. 8, 11.
119. Id. at 11–12 para. 11.
continued presence would amount to an “arbitrary deprivation of property” in violation of Section 25(1) of the Constitution. The High Court ordered the eviction. When the case reached the Constitutional Court, the point of focus was whether, considering all the circumstances, the eviction was “just and equitable” under the PIE Act, read as it must be in light of the Constitution. Initially, the Court stated that pertinent considerations to be addressed included: (1) the rights of the owner in a constitutional and PIE era; (2) the obligations of the City to provide accommodation; (3) the sufficiency of the City’s resources; (4) the constitutionality of the City’s emergency housing policy; and (5) an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues.

The Constitutional Court found that the developers were entitled to evict the occupiers, but that the eviction would not be “just and equitable” under the PIE Act until the City provided the occupiers with temporary accommodation. It ordered the City to provide the occupiers such accommodations within five months of the date of the judgment. Specifically, the Constitutional Court found that:

It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight’s situation in this case has already illustrated. An owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.

In other words, in circumstances where an eviction of occupiers from private property would render the occupiers homeless,

121. Blue Moonlight 2012 (2) SA at 115 para. 30.
122. Id. at para. 33.
123. Id. at para. 97. The Court noted the length of time the occupiers had been on the property, the fact that the residency had once been lawful, the fact that the eviction would render the individuals homeless, and that there was no “competing risk of homelessness on the part of Blue Moonlight.” Id. at para. 39.
124. Id. at para 40.
the rights of developers may have to yield to the occupiers’ right to housing, albeit not indefinitely.\footnote{125}

The City contended that it was bound to provide temporary accommodation \emph{only} for those evicted and relocated by the City primarily due to hazardous building conditions, but not those who would be rendered homeless as a result of eviction by private landowners.\footnote{126} For persons evicted by private landowners, the City policy was to investigate and assess “whether a particular set of circumstances merits the submission to Province of an application for assistance under Chapter 12 [of the Housing Code].”\footnote{127} The Court found that this distinction was unconstitutional under the equal protection\footnote{128} and right to housing provisions of the Constitution.\footnote{129}

A point of interest in the case is that with respect to the question of the sufficiency of the City’s resources, the Court was unmoved by Johannesburg’s argument that it did not have the money to provide alternative housing because it had not and could not budget for those evicted by private landowners. The Court responded that if the City did not properly budget for this situation, it cannot now complain that it lacked the resources for compliance with its legal obligations.\footnote{130}

\textit{Blue Moonlight}, without doubt, was a victory for the poor residents. However, housing rights advocate should be concerned about one aspect of the consequences of this type of relief ordered. In effect, the Court ordered the City to subsidize a private developer. Developers are incentivized to buy up derelict properties, evict persons who have been staying on these properties in desperate circumstances for many years and then seek to make a handsome profit by way of gentrification. No party to the proceeding, nor the Court or the progressive bar, addressed the distributive consequences of the decision, which are, in essence, that the City—i.e., the taxpayer—is going to absorb the social-dislocation costs of economic development, rather than the developer. Of course, it is better for the

\footnote{125} In making this ruling, the Constitutional Court found that the protection against arbitrary deprivation of property must be balanced against the right to access to adequate housing and the right not to be arbitrarily evicted. \textit{Id}. at 17 para. 34.
\footnote{126} \textit{Id}. at 35–36 para. 76.
\footnote{127} \textit{Id}. at 38 para. 81.
\footnote{128} S. Afr. Const., 1996 § 9(1) (“Everyone is equal before the law and has the right to equal protection and benefit of the law.”).
\footnote{129} \textit{Blue Moonlight} 2011 (2) SA at 131 para. 87.
\footnote{130} \textit{Id}. at 126–27 paras. 71–74.
City to pay these costs than to visit them on the evicted tenants. As a long-term question, however, a coherent plan to supply housing for the poor requires assessment of some relocation costs to developers; not to do so results in the taxpayer subsidizing the developer’s profits while getting nothing in return that might be used to deliver social goods.131

Another troubling aspect of Blue Moonlight is the Constitutional Court’s failure to follow up and enforce compliance with its judgment. When the City refused for three months to engage with the residents or their lawyers and the eviction date was looming, the residents again approached the Constitutional Court. The Court dismissed their urgent application, later stating that it was not the appropriate forum to enforce or vary the orders it gives on appeal even though the developer demurred in court with respect to any urgency regarding developing the land.132

VI. CONCLUSION

Adequate housing for all is a crucial, if minimal, requisite of human stability. The symposium at which these remarks were addressed raised critical questions and challenges for U.S. advocates regarding whether and how human rights discourse can be effectively deployed in the United States to secure a right to housing. Here I have tried to relate some important experiences and draw lessons from South Africa that might spur discussion and debate in the U.S. advocacy community.

Human rights discourse, particularly social and economic rights discourse, can make an effective contribution to realizing housing for all in our society, but is, I believe, ultimately a limited tool. The strength of social and economic rights discourse is twofold. First, it is a powerfully resonant and mobilizing rhetoric that articulates the moral imperative of guaranteeing a decent condition

131. A more optimistic outcome fervently to be desired is that the Blue Moonlight judgment will precipitate a negotiated process of cooperation between the authorities and developers. The firm strictures of Blue Moonlight regarding alternative housing might introduce a delay factor that is uncongenial to developers’ plans, in which case developers may find it in their self-interest to assume a portion of the transition costs.

and livelihood for all and exposes the gendered, racial and cross-
nation inequality of the status quo. Second, it has the potential to shift discussion away from a myopic focus on and concern with individual responsibility and a false discourse of “dependency” on government-funded social welfare programs without recognizing the interdependency of all in society.  

Human rights discourse moves the framing of the discussion into a universal approach in which society has and assumes responsibility to provide for the subsistence needs of all.

Its weakness, however, is that beyond abstractions (the right of all people to equal concern of the state, the right of everyone to live in dignity, rights to social goods, et cetera), human rights discourse tells us precious little that we need to know in order to address questions of institutional design and delivery. The strength of human rights is discursive—human rights principles can move people—but human rights concepts have very little analytical traction. For example, they cannot tell us much about how to design and finance social welfare policies that incorporate and deliver on the rights to housing, social assistance, water, education, health care and universal social assistance. Courts and legislatures in countries with constitutions containing progressive social and economic rights provisions face difficult decisions about how to stretch limited resources to build housing, deliver water, provide medical care, construct schools, and so on. Human rights discourse affirms that all of these are profound moral imperatives and should be legal requirements in a just society, but it gives little guidance on how to set priorities, make the inevitable tradeoffs among the panoply of social and economic rights, or establish institutional systems that will produce results on the ground. Moreover, decisions of this kind are not merely “technical” problems; they implicate controversial choices that will result in differential distributive outcomes for groups in society. Focusing on human rights discourse takes the debate about social welfare policy and programs away from a now disintegrating model based primarily on participation in waged work, but does not give us answers to the hard questions of institutional design that

those of us committed to income/asset equality must address. So while I am very committed to the dissemination of human rights discourse and particularly to sophisticated development of social and economic rights discourse, I remain skeptical that the human rights framework is a magic bullet.

Recent South African social and economic rights jurisprudence provides lessons that should push the thinking of U.S. housing advocates. Can we use U.S. equity jurisprudence to promote a concept similar to “meaningful engagement”? Can we draw principles of social and economic justice from our federal and state constitutions? Can we re-imagine private common law doctrines so that they reflect our constitutional vision? Broad principles of human rights take us only so far, that is, to the threshold of complicated and vexing questions of economic development, distribution and redistribution. Responsible advocates cannot shy away from such questions, seeking a false sense of security in the purity of human rights doctrine, but rather must engage with these “messy” problems of finance, economic growth, social organization, and administration.