

*'APPROPRIATE, JUST AND EQUITABLE RELIEF'
IN SOCIO-ECONOMIC RIGHTS LITIGATION:
THE TENSION BETWEEN CORRECTIVE AND
DISTRIBUTIVE FORMS OF JUSTICE*

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I INTRODUCTION

The Constitutional Court (CC), in adjudicating socio-economic rights cases, has (in addition to separation-of-powers and institutional-competence considerations) been influenced by the form of justice toward which it is inclined, namely distributive justice as opposed to corrective justice. This fact has significantly influenced the kinds of remedies granted by the CC, which have tended to guarantee socio-economic rights as collective rather than individual rights. The approach of the CC to remedies ties in with the fact that the Constitution¹ itself is implicitly imbued with distributive justice: even where the Constitution guarantees what appears to be individual rights, their enforcement is subject to the values that promote the public good and common interest. In addition, the social and economic context within which the Constitution is enforced dictates that even seemingly individualized socio-economic rights must often be enforced as 'group rights'.

The purpose of this paper is to establish a theoretical platform for an understanding of how different notions of justice (corrective vs distributive) influence the remedies that courts grant. The corrective justice philosophy demands that victims be put in the position they would have been in but for the violation of their rights. On the other hand, the distributive-justice philosophy is based on a recognition of the constraints of putting victims in the same position they would have been in had the violation not occurred. The distributive justice philosophy does not, however, focus solely on the interests of the victim. A court basing its decision on distributive justice will decline to put the victim in the position he or she would have been in but for

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¹ Constitution of the Republic of South Africa, 1996.

the violation if this would have a negative impact on other legitimate interests.²

II CORRECTIVE AND DISTRIBUTIVE FORMS OF JUSTICE DISTINGUISHED

In order to understand the issues related to constitutional remedies, one needs to understand the goals that courts seek to achieve when they enforce particular types of remedies.³ As mentioned above, the remedies that a court chooses will be determined by the kind of justice to which that court is inclined, either generally or in a particular case. It has been submitted that the rules governing the choice of remedy cannot, and should not, be fashioned apart from and independent of the adjudicator's belief about the nature and justice of the underlying claim.⁴ It is therefore important to understand the different forms of justice that courts pursue.

(a) *The ethos of corrective justice*

The traditional conception of litigation as guided by corrective justice reflects a nineteenth-century vision of society, which promoted the individual as an autonomous entity.⁵ The corrective-justice theory is also guided by a vision of libertarianism — a vision which prefers corrective justice rather than distributive justice. Those who subscribe to libertarianism are of the view that each person has the right to live his or her life in any way he or she chooses, as long as he or she respects the equal rights of others. The government exists only to protect people from the use of force by others.⁶ From this perspective, individual freedom cannot be sacrificed for the sake of the common good; and each person possesses an inviolability based on justice that even the welfare of society as a whole cannot override.⁷

In terms of this view, the primary function of a court is the resolution of disputes in order to achieve fair results in respect of human interaction; and to maintain the autonomy of each individual.⁸ It is for this reason that the supporters of libertarianism define human rights in a negative manner. In terms of this philosophy, all that we need are those rights that guarantee

² Kent Roach 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona LR* 859 at 859.

³ Michael L Wells & Thomas A Eaton *Constitutional Remedies: A Reference Book for the United States Constitution* (2002) xxv.

⁴ Owen M Fiss *The Civil Rights Injunction* (1978) 91.

⁵ Abram Chayes 'The role of the judge in public law litigation' (1979) 89 *Harvard LR* 1281 at 1285.

⁶ Davis Boaz 'The coming of libertarian age' in (1997) 19 *CATO Policy Report*, available at <http://www.heartland.org/pdf/63011a.pdf> (last accessed 25 June 2006).

⁷ Michael J Sandel *Liberalism and the Limits of Justice* 2 ed (1998) at 16. See also John Rawls *A Theory of Justice* (1999) 3.

⁸ Chayes op cit note 5 at 1285.

non-interference from others in our enterprise of seeking autonomy;⁹ and litigation is viewed as a vehicle to restore the autonomy of those whose rights have been interfered with. Libertarianism places much emphasis on the concept of property and the unfairness of distributing property that had been gained through individual effort. Therefore libertarians reject the welfare state in favour of a liberal non-interventionist state that respects property rights.¹⁰ Whenever property is unjustly taken away, libertarianism demands that it be returned to the rightful owner (hence the relevance of corrective justice).

The philosophy of corrective justice recognizes the fact that the complete prevention of legal wrongs is impossible. However, this philosophy perceives the law as a tool for restoring those who have been wronged to the position they would have been in but for the wrong.¹¹ Aristotle defined corrective justice (which he favoured above distributive justice) as the kind of justice ‘which plays a rectifying role in a transaction between man and man’¹² and he insisted that judges must possess the intellectual virtue of practical wisdom in order to determine the just result in all cases.¹³

Corrective justice has also been described as compensatory justice associated with three essential features, namely: (i) that the parties are treated as equals; (ii) that there must be damage inflicted by one party on another; and (iii) that the remedy granted must seek to restore the victim to the condition he or she had been in before the violation.¹⁴ Once a violation is proven, the judge has to insist on a full correction without attempting ‘either to balance the affected interests or changing . . . behaviour in the future’¹⁵ — that is to say, the judge must focus on restoration of the status quo.

In modern private law, corrective justice is not only prominent in tort (delict) law, but also has a presence in property and contract law.¹⁶ For example, when parties enter into a contract it is assumed that they begin as equals who accept corresponding rights and duties. An omission by one party

⁹ J Garret ‘The limits of libertarianism and the promise of a qualified care ethic’ (2004), available at <http://www.wku.edu/~jan.garrett/ethics/libcrit.htm> (last accessed 25 June 2006).

¹⁰ See Christopher Heath Wellman ‘Justice’ in Robert L Simon (ed) *The Blackwell Guide to Social and Political Philosophy* (2002) 60 at 70. See also generally Alan Ryan ‘Liberalism’ in Robert E Goodin and Philip Pettit (eds) *A Companion to Contemporary Political Philosophy* (1995) 291.

¹¹ See Kent Roach *Constitutional Remedies in Canada* (1994) at 3–17–18.

¹² Aristotle *Nicomachean Ethics* V at 2–5, as quoted by Mark C Modak-Truran ‘Corrective justice and the revival of judicial virtue’ (2000) 12 *Yale Journal of Law & Humanities* 249 at 250.

¹³ See Modak-Truran op cit note 12.

¹⁴ Dinah Shelton *Remedies in International Human Rights Law* (1999) at 38.

¹⁵ Roach op cit note 11 at 3–2.

¹⁶ See Curtis Bridgeman *Strict Liability and the Fault Standard in Comparative Justice Accounts of Contract Public Law and Legal Theory* Working Paper No 146, Florida State University College of Law, available at SSRN: <http://ssrn.com/abstract=669504> (last accessed 22 June 2006).

to discharge his or her duty, for example by not paying the price or delivering the goods, destabilizes the equality of the parties. It leads to an unjustifiable gain by one party and a corresponding loss to the other party. The effect of such conduct is that it changes the position of both parties, unfairly advantaging one and disadvantaging the other. This is what is meant by destabilization of the parties' equality and the purpose of the law in this situation is to restore the equality.¹⁷ The same destabilization of equality is present in the case of delictual wrongs because of the alteration of the victim's position as a consequence of the wrongdoer's conduct. The victim will have to endure physical, emotional, financial or other loss which would not have occurred if the wrong was not committed. According to Aristotle

'[c]orrective justice is the intermediate between an involuntary gain and loss. According to the corrective justice understanding of legal adjudication, the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, *this kind of injustice being an inequality, the judge tries to equalize it.*'¹⁸

The purpose of the law, from this perspective, becomes one of looking back to the position of the parties before the wrong was committed and assessing the impact of the wrong on the status quo. It is for this reason that corrective justice has been described as backward-looking, focusing as it does on the particular events that affected a particular individual.¹⁹ It is not, however, enough that the victim's status has been altered: there must be proof that the alteration has resulted from the defendant's wrong for liability on the part of the defendant to be established.²⁰ The question posed by corrective justice, therefore, is whether the plaintiff has suffered an injustice at the hands of the defendant.²¹

A judge is required to consider only the distinctive character of the injury rather than the virtue of the parties; and to determine which party inflicted the injury and which party suffered it.²² Corrective justice is therefore not concerned with the character of the parties. According to Aristotle, an injury

¹⁷ Ernst J Weinrib 'Corrective justice in a nutshell' (2002) 52 *University of Toronto LJ* 349. See also Modak-Truran op cit note 12 at 252.

¹⁸ Aristotle, as quoted by Modak-Truran op cit note 12 at 256 (my emphasis). According to Aristotle, corrective justice takes the form of an arithmetical progression: If there are two equal parties (A and B), and after a transaction, A has injured B to the extent of C, their relation is: $A + C = B - C$. To restore the balance, the judge takes C from A and gives it to B, creating a new relationship: $(A + C) - C = (B - C) + C$, an arithmetical mean between gain and loss in which the relative positions of the parties is once again the same.

¹⁹ Ken Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in Jeffrey Berryman (ed) *Remedies: Issues and Perspectives* (1991) 1 at 21.

²⁰ See Roach op cit note 11 at 3–19.

²¹ Ernst J Weinrib 'Restitutionary damages as corrective justice' (2000) 1 *Theoretical Inquiries in Law* 1 at 3.

²² Modak-Truran op cit note 12 at 252.

is an injury: ‘It makes no difference whether a good man has defrauded a bad man or a bad man a good one’.²³

The discretionary space of a judge who adopts a corrective-justice approach is very limited in that he or she has to live up to the demands of causation and restoration.²⁴ In remedial terms, the catalogue of remedies from which the judge can choose is also very limited. He or she is restricted to those remedies that restore (in so far as it is possible) victims to their previous position. The court therefore focuses on establishing liability which can be linked to the wrongful conduct of the defendant as guided by the principles of liability and causation.²⁵ The wrong is an essential element because it is the right-infringing wrong which forms the subject of the claim.²⁶ It is unjust for a defendant to be required to remedy that for which fault has not been proven on his or her part; and if fault is proven, it is unjust if the victim is not restored to the position he or she had been in before the wrong had been committed.²⁷

Corrective justice is, furthermore, not concerned with the impact of its remedies on the defendant or on third parties. The court focuses only on the interests of the plaintiff. An example of this view can be found in a Canadian case where, in ordering compensation against a university, a dissenting judge was not concerned with whether or not the order would negatively impact on the University’s already strapped finances. Justice Wilson in *McKinney v University of Guelph (Mckinney case)*²⁸ observed as follows:

‘I recognize that the enforced retirement of the appellants was not motivated by unconstitutional animus but rather by the severe fiscal restraints under which the universities have been forced to operate. I also appreciate that an award of damages in addition to reinstatement will place an additional monetary burden on these already financially strapped institutions. Impecuniosity and good faith are not, however, a proper basis on which to deny an award of compensatory damages. Such damages are clearly part of the web of remedies that go to make an injured party whole.’²⁹

As is shown below,³⁰ the majority disagreed, taking into consideration the financial impact that compensation would have on the university. According to the majority, in addition to the interests of the aggrieved staff, the interest of the public in the operation of universities needs to be considered.

²³ Aristotle, as quoted by Modak-Truran op cit note 12 at 257.

²⁴ Roach op cit note 2 at 859.

²⁵ Roach op cit note 11 at 3–17.

²⁶ Shelton op cit note 14 at 39.

²⁷ See Gregory C Keating ‘Distributive and corrective justice in tort law of accidents’ (2000) 74 *Southern California LR* 193 at 198.

²⁸ (1990) 76 DLR (4th) 545; [1990] 3 SCR 229.

²⁹ The text of the case is available at <http://scc.lexum.umontreal.ca/en/1990/1990rcs3-229/1990rcs3-229.html> (last accessed 18 September 2006).

³⁰ Under the heading ‘The ethos of distributive justice’.

(b) Corrective justice and traditional litigation processes

Corrective justice has played an important role in defining and modelling traditional private-law litigation processes. Traditional litigation procedures are primarily aimed at establishing the liability of the defendant, if any. Traditional litigation is also adversarial in nature. In such litigation it is assumed that the judge is an independent and neutral participant with a passive role to play.³¹ The role of the judge is simply to determine liability, and once this is done, to restore the parties to the position they had been in before the wrong leading to liability occurred. The judge is supposed to be independent and impartial, which is the reason why he or she is excluded from any partisan role and reserves judgment until presentation of the facts and arguments.³² A judge cannot answer any questions unless they are put to him or her by the appropriate party, who must also follow the appropriate procedure.³³

In traditional litigation, the remedial process begins only after the establishment by the plaintiff of the defendant's liability. It is very important to identify, with precision, not only the victim but also the perpetrator of the wrong. The victim in this form of litigation is identified by using very strict rules of standing — the plaintiff must establish his or her standing by proving that he or she had a right, the enjoyment of which was brought to an end by the actions of the defendant. The plaintiff has to stand not only in the position of a victim but also as a beneficiary of any relief that may be claimed from the court.³⁴

The litigation process focuses on the wrong that is alleged to have been committed, and the incidents leading up to the wrong are very important as determinants of liability. Once the wrong has been established, the remedy is deemed to flow naturally and smoothly from this process.³⁵ The remedies that the courts grant after finding of a violation must be connected to the rights and duties of the parties and must be intended to restore those duties and rights. This requires that a close relationship be maintained between

³¹ See, generally, Susan P Sturm 'A normative theory of public law remedies' (1991) 79 *Georgetown LJ* 1355 at 1360.

³² *Ibid* at 1383.

³³ Traditionally, the victim of a violation was identified as an individual litigating for him- or herself. However, the growing awareness that some transactions could no longer be viewed as bilateral gave birth to the class or representative action. See Chayes *op cit* note 5 at 1283.

³⁴ Chayes *op cit* note 5 at 1290. A multilateral transaction can lead to multilateral damage, and it may be convenient that the claims of all those who have suffered at the hands of the same defendant or defendants be heard in the same suit. In spite of this, the element of damage and 'victimhood' still has to be established on behalf of each individual plaintiff. The group is just an aggregation of identifiable individuals who have the same interests and have suffered the same harm, sometimes at the hands of the same defendant.

³⁵ Theodore Eisenberg & Stephen C Yeazell 'The ordinary and the extraordinary in institutional litigation' in (1980) 93 *Harvard LR* 465 at 474.

rights and remedies; and the nature of the remedy is determined by the nature of the liability and the harm done.

This form of litigation, as supported by corrective justice, is not suited to structural or systemic violations arising from organizational behaviour. This is because of the complexities of proving causal responsibility for the harms that are caused by such violations.³⁶ Systemic violations are those violations that establish themselves and endure in a sustained manner as part of an institution’s behaviour. Often the violation will not be the product of actions of identifiable officials, but instead it may arise from a web of institutional practices entrenched in an ad hoc manner as part of the operational system. The violation is but a symptom of a bigger problem requiring a systemic approach for its resolution.

However, this does not mean that corrective justice should be discarded completely where violations result from organizational behaviour. It may, for instance, be used to address discrete wrongs suffered by individuals at the hands of state officials. Where a constitutional violation arises from a ‘one-shot’ wrong and is suffered by an identifiable victim at the hands of an identifiable wrongdoer, corrective justice can be used to correct such harm.³⁷

It is important to note, however, that corrective justice’s insistence on full correction sometimes places unrealistic demands on the courts and fetters their ability to do justice. This is especially so where a number of interests are implicated by a case: ‘[corrective justice] cannot guide a court’s sense of priorities in responding to patterns and practices of violations in institutions or in accommodating social interests in devising remedies’.³⁸ With this model of justice there is a fusion of rights and remedies as the purpose of the latter is to realize the former. A remedy is not suited to the right if it cannot restore the position of the victim. On the other hand, distributive justice suggests that, where necessary, rights and remedies can be treated as two separate things. The needs of justice may demand that the remedy adopted should not necessarily be that which leads to the full realization of the right. It is this difference between corrective and distributive justice that runs through the debate on the relationship between rights and remedies.³⁹

(c) The ethos of distributive justice

Distributive justice is that domain of justice concerned with the distribution of benefits and burdens among members of a given group who enjoy the

³⁶ Roach op cit note 2 at 865.

³⁷ Ibid at 870.

³⁸ Ibid at 861.

³⁹ Lawrence Gene Sager ‘Fair measure: The legal status of underenforced constitutional norms’ (1978) 91 *Harvard LR* 1212; David M Walker *The Law of Civil Remedies in Scotland* (1974); and Daryl J Levinson ‘Rights essentialism and remedial equilibration’ (1999) 99 *Columbia LR* 857.

relevant benefits and shoulder the relevant burdens.⁴⁰ The benefits may come to such members simply by virtue of their membership of the group or as a result of some entitlement.⁴¹ The concept of distributive justice, unlike corrective justice based on the philosophy of libertarianism, is supported by utilitarianism. The philosophy of utilitarianism is based on the belief in an individual's wellbeing, but it also lays emphasis on the common good of society and the wellbeing of all its members.

From a utilitarian perspective, the law and the courts have important roles to play in the enterprise of realizing collective wellbeing. In terms of this view, courts have to consider interests other than those of the parties before them. In this context, actions, policies, and institutions are judged in terms of the extent to which they maximize overall happiness and wellbeing.⁴² It is this form of justice that persons such as Jeremy Bentham and John Stuart advocated in the nineteenth century. They viewed the laws that existed then as morally atrocious because they prevented rather than promoted overall happiness.⁴³ Utilitarianism also represents itself in the form of what has been described as communitarianism, a concept which challenges libertarianism on the ground that an individual is not an end, but exists together with others with whom he or she pursues a common end.⁴⁴ Communitarians hold that an ideal society is one that defines individuals in terms of what they are and the values that they have.⁴⁵

Unlike bilateral corrective justice, distributive justice is, therefore, multilateral. Justice from this perspective is the standard by which conflicting values are reconciled and competing conceptions of good accommodated or resolved.⁴⁶ Though a court case may have only two parties, distributive justice views it as having community-wide implications. As a result, the court focuses on what Cooper-Stephenson has described as collateral interests that need secondary consideration.⁴⁷ This has arisen from the recognition that not all interested persons may be party to a suit, and yet their interests may be affected by the outcome of that suit.⁴⁸ While corrective

⁴⁰ See Aristotle, as quoted by Modak-Truran op cit note 12 at 250.

⁴¹ Dennis Klimchuk 'On the autonomy of corrective justice' (2003) 23 *Oxford Journal of Legal Studies* 49 at 50.

⁴² Wellman op cit note 10 at 60.

⁴³ Ibid at 61.

⁴⁴ See Stephen Mulhall & Adam Swift *Liberals & Communitarians* (1996) 10. See also generally Will Kymlicka 'Community' in Allan Ryan, Robert E Goodin & Philip Pettit (eds) *A Companion to Contemporary Political Philosophy* (1995) 366; and T M Scanlon *What We Owe Each Other* (2000).

⁴⁵ Mulhall & Swift op cit note 44 at 13.

⁴⁶ Sandel op cit note 7 at 6

⁴⁷ Cooper-Stephenson op cit note 19 at 19

⁴⁸ Ibid. See also Lon Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard LR* 353.

justice seeks to explain why ‘*this* defendant is liable to *this* plaintiff’,⁴⁹ distributive justice focuses on the broader societal interests.⁵⁰

Distributive justice is based on an acknowledgement that it is not possible in all cases to put the victim of a wrong in the position they would have been in but for the violation. In the modern context it is not always possible to identify discrete wrongs and the wrongdoer with precision.⁵¹ Harm may be inflicted on groups of people, and not only on an individual victim, and may arise from conduct that cannot be associated, in liability terms, with a specific defendant. Where the state is the obligation-bearer in this context, it may be necessary for the court to look at the wider obligations of the state and not just its liability in the case at hand. Without asking whether or not government is at fault, the court could, in some circumstances, dedicate its efforts to finding solutions that may do away with the harm. In this context, therefore, the liability rules of corrective justice will be of limited application.

In England the remedies arising from the administration of distributive justice have their roots in the law of equity, the application of which began as a response to the inadequacies of the common law in remedying certain violations. Historically, the common law had been a rigid body of law, which recognized only specific causes of action through the writ system, granting rigid remedies to fit the specific writ. What equity did was to introduce a sense of flexibility into the law and to soften the common law and make it fairer.⁵² It is this form of flexibility that has been embraced by the proponents of distributive justice. Equity has been described as a complex theory and doctrine which requires balancing of the affected interests before intrusive remedies are ordered.⁵³ This is in addition to affirming the judge’s broad and flexible remedial discretion.⁵⁴ This balancing and wide discretion has allowed courts to award remedies that may be short of full correction. This is because ‘[t]he disengagement of right and remedy in equity allows judges to provide less than rectification demands’.⁵⁵ In addition, equity allows the court to focus not only on the needs of the parties but also to consider third party interests implicated by the case. Although equity is not part of South

⁴⁹ Lionel Smith ‘Restitution: The heart of corrective justice’ (2001) 79 *Texas LR* 2115 at 2116.

⁵⁰ It is not true, as is suggested by Horowitz, that all forms of adjudication focus on ascertaining whether one party has a right and another a duty. See Donald Horowitz *The Courts and Social Policy* (1977) at 34. While this may be true of traditional litigation based on corrective justice, it is not true of modern litigation based on distributive justice. The question of alternatives is central to distributive justice as it helps the court find solutions that address, as much as is possible, the interests that need to be balanced.

⁵¹ Roach *op cit* note 11 at 3–19.

⁵² Jeffrey Berryman *The Law of Equitable Remedies* (2000) 2.

⁵³ See Chayes *op cit* note 5 at 1292–3.

⁵⁴ Roach *op cit* note 2 at 887.

⁵⁵ *Ibid* at 860.

African law and although discretionary remedialism has not been adopted *eo nomine*, it may be argued that similar principles are implicitly employed by the courts in various situations.

Unlike the case with corrective justice, a judge dispensing distributive justice will rely on the breadth and flexibility of the equitable remedial powers without careful attention to the demands of causation and restoration.⁵⁶ Rather than be guided by strict rules of procedure, and be bound by the existing causes of action and remedies, distributive justice allows the court very wide discretion to fashion causes of action and remedies as the needs of justice demand. Distributive justice puts equity in its right place by treating it as a primary source of law. In some common-law countries, a court is not bound by the requirement that equitable remedies will only be available where common law remedies are proven to be inadequate, enabling it to embrace the full breadth of equity and its benefits:

‘It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties . . . ; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice.’⁵⁷

Unlike corrective justice, distributive justice does not emphasize liability but effects of one’s activities. Its multilateral nature compels a court to ascertain how its remedial measures, irrespective of whether or not liability has been declared, will impact on the interests of other people. The backward-looking nature of corrective justice, geared towards ascertaining liability, may not be suitable to address all current legal problems. Many legal problems and disputes are no longer bilateral. The world we live in has complex and interdependent interests, a reality which the courts must acknowledge when they choose remedies.⁵⁸ All the interests implicated by the case must be considered and the impact of the remedy on them assessed.

Due to the need to avoid repetition of the same conduct, distributive justice allows remedies to have a future direction and focuses on the needs of the community as a whole. This should be contrasted with corrective justice, which is backward-looking and focuses on the individual claimant. It is true that the process of administering distributive justice may begin with a pronouncement on the legal consequences of past actions. However, unlike the backward-looking liability rules of corrective justice, distributive justice will use such past actions as a basis to determine future actions.⁵⁹ In this setting the role of the court at the remedial stage is not to determine where

⁵⁶ *Ibid* at 859.

⁵⁷ Murphy J in *Porter v Warner Co* 328 US 395 (1946) at 398.

⁵⁸ Roach *op cit* note 11 at 3–19.

⁵⁹ See Chayes *op cit* note 5 at 1294.

fault lies. Rather, it is to develop a plan that fairly and effectively realizes the rights not only at the time of the case but in future as well.⁶⁰ The court will identify the needs that have to be addressed, and it will select remedies in response to them. This is important because remedies based on needs are more directly relevant to the future of those who have been wronged in the past.⁶¹

The remedy must be one that satisfies all the interests concerned. The emphasis should not be solely on the correction of the wrong; and complete correction may be ignored for the sake of addressing other interests. It is true that both corrective and distributive justice demand that where a defendant is found to have violated constitutional rights, the violation must be stopped. However, where distributive justice differs from corrective justice is that it will insist on full correction of the violation ‘absent special circumstances’.⁶² ‘Special circumstances’ means those circumstances which may impact on the remedy. This may, for instance, include the costs associated with the implementation of the remedy. Special circumstances also include factors that may affect interests other than those of the parties in the court case. Such other interests have to be balanced against those of the parties. Balancing of these interests may not be possible where a judge insists on full correction of the wrong:

‘Once the constraints of corrective justice are abandoned, I can imagine a justice system in which the needs of the plaintiffs, of affected interests and of society are placed directly on the remedial agenda of courts. Victims will not have to concentrate on tracing the harms which can be attributed to past wrongs, but rather can educate the court about their present needs. Likewise, governmental defendants will not have to channel their energies into claims of innocence and lack of responsibility for harms. They can directly educate courts about the resource constraints they face. For their part, judges could be directly concerned with the practical prospects for genuine reform and reconciliation. They would not have to pretend that the remedies they order inexorably follow, fit and repair the extent of wrongdoing.’⁶³

The approach described above requires the court to consider the costs and benefits of a particular remedy. For instance, damages in socio-economic rights litigation deplete the already limited state resources, which may affect the state’s capacity to deliver goods and services.⁶⁴ In the Canadian case of *McKinney*, for example, the majority thought that requiring the university to adhere to the statutory state retirement age requirements would adversely affect the University’s already strapped finances and would impact on the public interest. Dickson CJ, for the majority, held as follows:

⁶⁰ Sturm op cit note 31 at 1393.

⁶¹ Roach op cit note 2 at 864.

⁶² Wells & Eaton op cit note 3 at xxv.

⁶³ Roach op cit note 2 at 864.

⁶⁴ See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005(2) SA359 (CC) (*Rail Commuters* case) para 80.

'In assessing whether there has been minimal impairment of a constitutional right, consideration must be given not only to the reconciliation of claims of competing individuals or groups but also to the proper distribution of scarce resources, here access to the valuable research and other facilities of universities. The universities had a *reasonable basis* for concluding that mandatory retirement impaired the relevant right as little as possible given their pressing and substantial objectives. Against the detriment to those affected must be weighed the benefit of the universities' policies to society.'⁶⁵

It should be noted that the various remedies come with a number of costs, not only financial but other costs such as forbearance of benefits and the limitation of rights and burdens. Some of these costs are not only relevant at the remedial stage but may even, on occasion, override remedying a violation.⁶⁶ While a court's approach in granting remedies may be intended to realize full protection of the infringed rights, it may come with unreasonable costs to the defendant. This is in addition to imposing burdens on third parties not before the court. Though the grant of remedies should not necessarily be deterred on the ground that they impose burdens on the defendant, these burdens cannot be ignored as they may impact the effectiveness of the remedy itself.⁶⁷

It is sometimes very difficult to design an effective remedy without imposing costs on third parties to the suit who may not even be violators.⁶⁸ The courts should, however, be careful not to impose on such third parties costs which may be viewed as unjust or unduly burdensome.⁶⁹ Such perceptions have the potential of creating resistance which undermines the implementation of the selected remedy. Ignoring the costs on third parties would amount to a failure to acknowledge the polycentric nature of constitutional disputes.⁷⁰

Consideration of the costs of the remedies is the essence of the idea of 'remedial cost internalization'. According to this notion, the remedy should limit the autonomy and choices of as few innocent individuals and institutions as possible.⁷¹ The risk of non-compliance with the remedy

⁶⁵ The text of case is available at <http://sc.lexum.umontreal.ca/en/1990/1990rcs3-229/1990rcs3-229.html> (last accessed 18 September 2006).

⁶⁶ Shelton op cit note 14 at 54 and Cooper-Stephenson op cit note 19 at 36.

⁶⁷ In the Canadian case of *Lavoie v Nova Scotia (Attorney-General)* (*Lavoie* case) 47 DLR (4th) 586 the court declined to make an order that the defendant establish facilities for francophone students. The court said that it would not make such an order until it was satisfied that the number of enrolled students was sufficient to justify the cost, and it observed that the defendant's interests in terms of costs had to be considered as well (at 594).

⁶⁸ Shelton op cit note 14 at 54.

⁶⁹ See also Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 at 412.

⁷⁰ See Jamie Cassels 'An inconvenient balance: The injunction as a Charter remedy' in Berryman op cit note 19, 271 at 300-3. See also Pieterse op cit note 69 at 412; and Fuller op cit note 49.

⁷¹ Cooper-Stephenson op cit note 19 at 36.

should itself be weighed as a cost that needs to be traded off against the effectiveness of the remedy.⁷² A less effective remedy may be selected where a more effective one heightens the risk of non-compliance. Gewirtz, for instance, contends that factors such as public resistance to the remedy should not be ignored:

‘Among the difficulties, indeed, the anguish, necessarily endured by those seeking to produce change in the world is that at times they must cede ground because of opposition. Remedies for violations of constitutional rights are not immune from that reality.’⁷³

The resistance encountered in the implementation of judicial decrees in the United States school desegregation cases supports Gewirtz’s view.⁷⁴ In some cases it was feared that immediate implementation of the court decrees would have exacerbated the resistance.⁷⁵ All that the court did at the beginning was to demand that the state desegregates the schools with all deliberate speed. It was only after resistance was encountered that the courts started giving concrete directions, in clear and precise terms, as to what was to be done to rectify the violation.

An effective remedy is therefore one that embraces and takes account of the problems that are likely to be encountered at the implementation stage. The court should look at the end results of its remedy and consider its long term effectiveness. Remedies which, for instance, impose high resource burdens on the state may force the state to adopt long-term strategies that will lead to the withdrawal of the challenged social programmes.⁷⁶ A remedy may be ignored simply because it is impossible to carry out, with the effect that the ideal it protects comes to be regarded as unrealistic. It is important to note that competing interests that are considered insufficient to override the purposes of the rights at the rights determination stage could be relevant and could be used at the remedial stage to limit the scope of the remedy. It is

⁷² Iain Currie & Johan de Waal *The Bill of Rights Handbook* (2005) 198.

⁷³ Paul Gewirtz ‘Remedies and resistance’ (1983) 92 *Yale LJ* 585 at 588.

⁷⁴ In the 1950s opposition to racial discrimination in public schools in the United States reached its peak, culminating in a series of judicial decisions from both the state and federal courts. The most significant decision in this direction was the 1955 United States Supreme Court case of *Brown v Board of Education* 349 US 294 (1955) (*Brown* case). In this case, the Supreme Court upheld decisions of several lower courts to the effect that racial discrimination in public education was unconstitutional and had to be remedied. This ruling did not, however, go down well with some parts of American society, resulting in resistance that affected implementation of the court decrees. The resistance manifested itself in the form of violence, flight by white people from public schools, boycotts, hostility, incitement, and foot-dragging by public officials.

⁷⁵ Shelton op cit note 14 at 54. See also Dennis Davis ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite”?’ (2006) 22 *SAJHR* 301 at 322.

⁷⁶ Cooper-Stephenson op cit note 19 at 32.

therefore not correct, as has been contended,⁷⁷ that an effective remedy is one that is capable of having an immediate effect.

In the United States school desegregation cases, for instance, white resistance could not have been used to limit the right to equality and freedom from discrimination; yet it was considered as limiting the scope of the remedies the courts were willing to grant. This may have, in the short run, appeared to be a limitation of the rights; yet it was calculated to give the courts time to devise the means of countering the resistance. It also served to preserve the legitimacy of the courts and to allow them to assert their remedial powers in a gradual and acceptable manner. The courts were merely taking cognisance of the fact that changing strongly held convictions cannot be done immediately.⁷⁸

III SOUTH AFRICA: CORRECTIVE OR DISTRIBUTIVE JUSTICE?

The South African courts have sought to extend their remedies beyond the individual litigant by granting remedies that advance constitutional rights that extend collective or group benefits. Though vindication and compensation of the victim has been acknowledged as a fundamental objective of constitutional litigation, it is not the only objective that is to be achieved. The interest that society has in the protection of the rights in the Constitution and the interest that it has in the protection of the values of an open and democratic society based on equality, freedom and human dignity, too, are precepts that the courts wish to advance. The courts have also taken into account the impact of proposed remedies on the defendant and how the relationship between the defendant and the plaintiff would be affected by a particular remedy. The CC has, in some cases, been inclined towards putting victims of constitutional violations in the position they would have been in had the violation not occurred. However, in the same cases, the interests of the community and the interests of the defendant, too, have featured in what the court has called 'a balancing process'.⁷⁹

Though the South African Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions that it envisions this form of justice. The Constitution is premised on the need to realize an orderly and fair redistribution of resources⁸⁰ — and in this respect it demonstrates a commitment to the establishment of a society based, amongst other things, on social justice.⁸¹ In addition to protecting individual rights, the Constitution guarantees a number of socio-economic rights directly

⁷⁷ See Mia Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *SAJHR* 215 at 217.

⁷⁸ Roach op cit note 2 at 882. See also Special Project 'The remedial process in institutional reform litigation' (1978) *Columbia LR* 784.

⁷⁹ *Hoffman v South African Airways* 2001 (1) SA 1 (CC) (*Hoffman* case).

⁸⁰ See Davis op cit note 75 at 304.

⁸¹ Preamble to the Constitution.

linked to social justice.⁸² While socio-economic rights have elements that are capable of extending individual entitlements, they also contain elements that can be enjoyed only in a group.⁸³ This is especially so in respect of the positive elements of these rights which compel government to undertake affirmative action to realize the rights and to provide goods and services directed at all members of society or at groups of people and not at specific individuals.

It would do little to advance the developmental objectives of the Constitution if the full spectrum of rights of an individual or groups of individuals is met while the rest of the community suffers. It is also difficult, if not impossible, to sustain such levels of services in respect of individuals, let alone the community. Consider, for instance, the right of access to water.⁸⁴ It requires the government to put in place water services provisions systems that are accessible to everyone.⁸⁵ The right of access to health care services is not different.⁸⁶ Hospitals and other health care facilities have to be established for the benefit of all.

It is especially in respect of socio-economic rights that the transformative nature of the Constitution has been underscored. The Constitution is perceived as an instrument to transform South African society from a society based on socio-economic deprivation to one based on equal distribution of resources.⁸⁷ The appropriate provision of services that were so drastically skewed by the apartheid system is therefore considered to be central to the transformative project of the Constitution.⁸⁸ However, the enforcement of socio-economic rights has generated much controversy arising from arguments about the need to maintain the separation of powers. This is in addition to questioning the institutional competence of the courts to enforce these rights. However, even when it is accepted that socio-economic rights are justiciable, there is always the question of whether they should be enforced in a way that confers individual benefits or in a way that confers group benefits.⁸⁹ In the Constitution itself, most socio-economic rights are

⁸² Siri Gloppen *South Africa: The Battle over the Constitution* (1997) at 58.

⁸³ Examples include elements of such rights as a clean and healthy environment and also ingredients of such rights as housing and health that can be put in place for the benefit of a number of people or groups of people.

⁸⁴ Section 27(1)(b) of the Constitution.

⁸⁵ See the Water Services Act 108 of 1997. See also Christopher Mbazira ‘Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati’ in J W de Visser & C Mbazira (eds) *Water delivery: Public or Private* (2006) 57.

⁸⁶ Section 27(1)(a) of the Constitution.

⁸⁷ See, generally, Karl Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 146.

⁸⁸ Pius Langa ‘Transformative constitutionalism’ (2006) 17 *Stellenbosch LR* 351 at 352.

⁸⁹ Kent Roach ‘Crafting remedies for violations of economic, social and cultural rights’ in John Squires, Malcolm Langford & Bret Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 111.

crafted as individual rights, as appears from formulations such as: ‘everyone has the right to . . .’⁹⁰ and ‘every child has the right to . . .’.⁹¹ Nonetheless, the question remains whether the prevailing social and economic context allows for the enforcement of these rights in the sense that they confer individual benefits on demand — in which case corrective justice would be applicable.

There is, therefore, a need to understand the existing socio-economic context and its impact on the enforcement of socio-economic rights. It is only by developing an understanding of the historical, social, political and economic settings that one can appreciate the challenges inherent in enforcing socio-economic rights in the sense of the conferral of individual rather than collective benefits.⁹² According to De Vos:

‘it is not only the constitutional *text* that forms the context within which the rights in the Bill of Rights must be viewed. In order to trace the direction in which the transformative project is supposed to move it is necessary to come to grips with the larger context within which the text of the Bill of Rights is to be interpreted. Thus, the Constitutional Court has often stated that the historical, social and economic context must be taken into account when interpreting the provisions of the Bill of Rights.’⁹³

In South Africa, socio-economic rights assume their importance from a context of not only racially institutionalized poverty but also a commitment to alleviate or eradicate such poverty.⁹⁴ It is an offshoot of apartheid that the majority of South Africans live in extreme poverty. It is on the basis of this context that the Constitution ‘sets as one of its primary aims the transformation of society into a more just and equitable place’.⁹⁵ One of the obstacles to the realization of this objective, however, is limited financial resources. The available resources are not adequate to facilitate immediate provision of socio-economic goods and services to everyone on demand as individual rights. Holistic approaches to providing socio-economic goods and services that focus beyond the individual are the most practical to implement. This is what the existing social and economic conditions dictate. Therefore one has to rethink the traditional idea that remedies must be immediate and that the courts must give one-shot remedies that achieve corrective justice.⁹⁶ Remedies of this nature may not be practicable and rights may have to be enforced in ways that provide collective benefits. This

⁹⁰ Sections 26(1) and 27(1) of the Constitution.

⁹¹ Section 28(1)(c) of the Constitution.

⁹² A J van der Walt ‘The state’s duty to protect owners v the state’s duty to provide housing: Thoughts on the Modderklip case’ (2005) 21 *SAJHR* 144 at 148.

⁹³ Pierre de Vos ‘*Grootboom*, the right of access to housing and substantive equality as contextual fairness’ (2001) 17 *SAJHR* 258 at 262 (emphasis in the original, footnote omitted).

⁹⁴ A J van der Walt ‘A South African reading of Frank Michelman’s theory of social justice’ (2004) 19 *South African Public Law* 253 at 255.

⁹⁵ De Vos op cit note 93 at 260.

⁹⁶ Roach op cit note 89.

is particularly so in a context where scarce financial resources dictate how government fulfils its obligations in respect of the realization of socio-economic rights.

The realization of these rights in contexts of scarce resources requires careful redistribution of the resources to benefit all in need of them. It is at this stage that the notion of distributive justice becomes most relevant. The courts have to focus beyond the immediate needs of the individual and must consider the interests of society as a whole or groups of people within society. Individual rights therefore have to be balanced against the collective welfare.⁹⁷ It has been submitted, for instance, that it would have been senseless to extend expensive treatment to Mr Soobramoney ‘at a time when many poor people . . . had little or no access to any form of even primary health care services’.⁹⁸ The CC had to leave it up to the hospital to decide how best to utilize scarce medical resources in a distributive manner without prioritizing individual needs at the expense of others who may need such resources.

It is on the basis of this approach that the CC has rejected the notion that the socio-economic rights provisions in the Constitution confer individual entitlements on demand. The CC has also rejected the notion that the Constitution be interpreted as establishing a minimum core which entitles every individual to a minimum level of goods and services on demand.⁹⁹ The CC has, furthermore, rejected the notion that s 28 of the Constitution guarantees every child access to basic nutrition, shelter, and health services irrespective of available resources. Instead, the CC has chosen to locate the claims of all individuals, adults and children within the broader dimension of society’s needs. According to the CC, all that the state is obligated to do is to put in place a reasonable programme, reasonably implemented to achieve the progressive realization of socio-economic rights, subject to the available resources. The programme must be inclusive of the needs of all people and must address short, medium and long term needs.¹⁰⁰

⁹⁷ Ziyad Motala & Cyril Ramaphosa *Constitutional Law: Analysis and cases* (2002) at 34.

⁹⁸ De Vos op cit note 92 at 259–60.

⁹⁹ See *Government of the Republic of South Africa v Grootboom* (Grootboom case) 2001 (1) SA 46 (CC) para 32 and *Minister of Health v Treatment Action Campaign (TAC case)* 2002 (5) SA 721 (CC). See also Theunis Roux ‘Legitimizing transformation: Political resource allocation in the South African Constitutional Court’ (2003) 10 *Democratization* 92; Sandra Liebenberg ‘Enforcing positive socio-economic rights claims: The South African model of reasonableness’ in Squires, Langford & Thiele op cit note 89 at 73; David Bilchitz ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 118 *SAJHR* 484; and David Bilchitz ‘Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence’ (2003) 19 *SAJHR* 1.

¹⁰⁰ See the *Grootboom* and *TAC* cases supra note 99.

The Constitution is imbued with the values upon which a democratic South Africa is based¹⁰¹ and the courts are constitutionally obliged to promote these values whenever interpreting the Bill of Rights.¹⁰² Though some of the values may be used to promote individual welfare, the CC has used the concept of values to advance the common good of society. Even when protecting individual rights the CC has on some occasions used values that promote general welfare to justify such individualized protection.¹⁰³

The Constitution itself, however, does not describe in an exhaustive manner the values upon which it is based. This has forced the courts on some occasions to look outside the Constitution for the values that should guide constitutional interpretation.¹⁰⁴ To effectively use these external values not necessarily found in the Constitution, the CC has freed itself from textualism as the only method of constitutional interpretation and has used other methods such as purposive interpretation¹⁰⁵ to give effect the values underlying the Constitution.¹⁰⁶ In the *Makwanyane* case, for instance, the CC used this method of interpretation to read into the Constitution the value of 'ubuntu', a concept permeated by the notion of distributive justice.¹⁰⁷

It has been submitted that although ubuntu is not mentioned in the Constitution it coincides with some of the values expressly mentioned.¹⁰⁸ The CC has indeed found no problem using ubuntu to promote distributive justice.¹⁰⁹ The court has, for instance, used the value of ubuntu as the basis

¹⁰¹ Section 1 of the Constitution. The values include human dignity, the achievement of equality and advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution; and universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

¹⁰² Section 39(1)(a) of the Constitution.

¹⁰³ An example of this, as discussed later, is the use of the concept of ubuntu to advance the individual's right to life. The individual has, therefore, been located as part of society and cannot be singled out for protection irrespective of the needs of others. See *S v Makwanyane* 1995 (3) SA 391 (CC) (*Makwanyane* case).

¹⁰⁴ See Irma J Kroeze 'Doing things with values: The role of constitutional values in constitutional interpretation' (2001) 12 *Stellenbosch LR* 265 at 267–8.

¹⁰⁵ Also referred to as 'value oriented' or 'teleological' interpretation; see Johan de Waal & M G Erasmus 'The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition' (1996) 7 *Stellenbosch LR* 179 at 181n8.

¹⁰⁶ *Makwanyane* case supra note 102 para 9. See also *S v Zuma* 1995 (4) BCLR 401 (CC) para 15.

¹⁰⁷ See, generally, Irma J Kroeze 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch LR* 252.

¹⁰⁸ *Ibid* at 256.

¹⁰⁹ In the *Makwanyane* case supra note 102 para 224, the CC described ubuntu as a culture which places some emphasis on communality and on interdependence of members of a community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. See also para 263.

for setting aside an order of excessive damages against the defendant in a case of defamation.¹¹⁰ It has also held that ubuntu requires that in cases of defamation the remedy granted should aim to restore a harmonious human and social relationship: ‘Historically . . . [ubuntu] was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatized society to overcome and transcend the division of the past’.¹¹¹ Today, according to the court, ubuntu represents the element of human solidarity that binds together liberty and equality and creates an affirmative and mutually supportive triad of central constitutional values.¹¹²

The promotion of constitutional values has therefore been central in the transformative enterprise of the CC. In constitutional litigation, protection has been accorded to individual needs only if they do not negatively impact on collective interests. This is reflected not only in the interpretation of the substantive content of the rights but also in the determination of the kinds of remedies that their violation demands. This approach has made it inevitable that the court would incline toward the notion of distributive justice in developing the concept of an ‘appropriate, just and equitable’ remedy — as is set out in detail in the next section.

Defining ‘appropriate, just and equitable relief’

Other than merely enforce the values that promote commonality, The CC’s resort to the ethos of distributive justice is reflected not merely in its enforcement of the values that promote commonality but also in its approach to granting remedies for the infringement of constitutional rights. The Constitution gives courts very wide remedial powers to ‘grant appropriate relief, including a declaration of rights’¹¹³ and to make ‘any order that is just and equitable’.¹¹⁴ The test for the effectiveness of the courts’ remedies, therefore, is whether the remedy is ‘appropriate, just and equitable’. It is important to note, however, that a court’s definition of what amounts to an ‘appropriate, just and equitable’ remedy will be determined, among other things, by the notion of justice favoured by that court. In this respect, the phrase ‘appropriate, just and equitable’ remedy could assume two meanings. On the one hand, it could refer to a remedy that is required by an individual whose rights have been violated in order to put him or her in the position he or she would have been in but for the violation. On the other hand, it could mean a remedy that focuses on all interests implicated by the case and balances these interests against those of the individual plaintiff in the case.¹¹⁵

As seen above,¹¹⁶ because of the bipolar nature of the theory of corrective

¹¹⁰ In *Dikoko v Mokhatla* 2006(6) SA 235 (CC) (*Mokhatla case*).

¹¹¹ *Ibid* para 113 [footnote omitted].

¹¹² *Ibid*.

¹¹³ Section 38 of the Constitution.

¹¹⁴ Section 172(1)(b) of the Constitution.

¹¹⁵ Roach *op cit* note 11 at 3–4.

¹¹⁶ See section 2.1 above.

justice, the burdens imposed by a remedy on third parties do not constitute a factor to be considered when choosing remedies.¹¹⁷ In contrast, distributive justice pays attention to the interests not only of the parties to the case but also of third parties. The remedy should be intended not only for the benefit of the plaintiff but for other similarly situated persons.

It is on the basis of the above that the CC has taken cognizance of the fact that when constitutional rights are violated — though the victim may be an individual — society as a whole is injured.¹¹⁸ If any remedies are to be obtained for such violations, they should be aimed at vindicating not only the victim but also advancing the interests of society as a whole.¹¹⁹ Even where an individual victim is clearly identifiable, any subsequent remedy is likely to have an impact on other persons and on society at large.¹²⁰ It is for this reason that the notion of distributive justice requires that courts be considerate not only to the interests of the parties but also the interests of society at large.¹²¹

It is on the basis of this that the CC has adopted an approach that spreads the benefits of constitutional litigation beyond the parties in a particular case. In *Azanian People's Organisation (Azapo) v President of the Republic of South Africa*,¹²² for instance, the court observed that

'[t]he resources of the State have to be deployed . . . in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past'.¹²³

On certain occasions the CC has also rejected proposed out-of-court settlements between the parties if it would result in a benefit of a constitutional right only to the parties.¹²⁴ The court has held that an offer to settle a dispute made by one litigant to another, if accepted, cannot cure the ensuing legal uncertainty which results from the fact that it would settle the dispute only between litigants. According to the court, this would not resolve the question of the possible unconstitutionality of the impugned provisions and their effect on the broader group of persons who may qualify for a similar benefit.¹²⁵ The court has also in certain circumstances declined to award remedies even where a violation of a constitutional right has been

¹¹⁷ Roach op cit note 11 at 3–21.

¹¹⁸ In the *Hoffman* case supra note 79 para 43.

¹¹⁹ Roach op cit note 11 at 3–30.

¹²⁰ Shelton op cit note 14 at 52. See also Cassels op cit note 70 at 290.

¹²¹ Iain Currie & Johan de Waal *The New Constitutional and Administrative Law* (2001) 288.

¹²² 1996 (4) SA 671 (CC).

¹²³ Para 43.

¹²⁴ See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) (*Khosa* case).

¹²⁵ *Khosa* case supra note 124 para 35.

proved if the interests of good governance require that a remedy should not be given.¹²⁶

To consider the interests of all those who may be affected by the outcome of the case requires a balancing of all the affected interests. The CC has observed that the balancing process must be guided, first, by the objective of addressing the wrong occasioned by the infringement of the constitutional right; secondly, by the objective of deterring violations; and thirdly, by the objective of giving an order that can be complied with. This is in addition to ensuring fairness to all those who might be affected by the relief.¹²⁷ Accordingly, successful litigants should obtain the relief they seek only when the interests of good government do not demand otherwise. The position of the CC therefore is that litigants before the court should not be singled out for the grant of relief, but relief should, taking account of the obvious limitations of litigation, as far as possible be afforded to all people who are in the same situation as the litigants.¹²⁸ This is important because, despite the fact that South Africa has an advanced constitutional system, courts are still not easily accessible to all.¹²⁹ Any remedies granted in constitutional litigation should, as far as possible, therefore extend the constitutional benefits to those without easy access to courts.

As noted above, in the *Mokhatla* case, for instance, the CC held that the principal objective of the law is ‘restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms’.¹³⁰ The court held that, instead of awarding damages that merely put a hole in the defendant’s pocket, the law of defamation should strive to re-establish harmony between the parties.¹³¹ This is because an award of excessive damages would have implications on free expression, which is the lifeblood of a democratic society.¹³² What this means is that vindicating the plaintiff’s injury by awarding excessive damages should be foregone for the sake of maintaining society’s right to freedom of expression. The court in the *Mokhatla* case suggested that consideration should be given to the impact the remedy has on the defendant. According to the court, if the plaintiff’s rights can be vindicated and restoration achieved using remedies less burdensome to the defendant, this approach should be adopted.¹³³

The CC’s approach here is in accord with the notion of cost internaliza-

¹²⁶ See *East Zulu Motors (Pty) v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) and *Steyn v The State* 2001 (1) SA 1146 (CC).

¹²⁷ *Hoffman* case supra note 79 para 45.

¹²⁸ *S v Bhulwana* 1996 (1) SA 388 (CC) para 32. Cited with approval in *Minister of Home Affairs v National Institute for Crime Prevention (Nicro)* 2004 (5) BCLR 445 (CC) para 74.

¹²⁹ Jackie Dugard ‘Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 *SAJHR* 261 at 266.

¹³⁰ Supra note 109 para 68.

¹³¹ Ibid.

¹³² See *ibid* paras 54 and 92.

¹³³ *Ibid* paras 64, 67, 112 and 113.

tion which, as discussed above,¹³⁴ requires the court to consider the costs which any remedy it may grant will have on the defendant. Prohibitive costs increase the risk of non-compliance with the remedy. The CC has pushed this notion further by not only considering the costs of non-compliance to society, but also the benefits that society may derive by compliance. This explains why the court has been reluctant to award damages if these would, for instance, have a negative impact on freedom of expression.

The CC has indeed doubted the appropriateness of damages as a public-law remedy and as the most appropriate method to enforce constitutional rights.¹³⁵ The court has held that there is no real evidence that awarding punitive damages will serve as a significant deterrent against individual or systemic repetition of infringements.¹³⁶ According to the court, an award of punitive damages, if it is to have a deterrent effect on government, should be substantial. The problem, in the CC's opinion, is that this will bring a windfall to a single plaintiff and yet similarly situated victims would not be entitled to similar awards.¹³⁷ In addition, substantial awards made against government will significantly impact on the available revenue and could therefore impinge on the executive's ability to function effectively. Though the CC has acknowledged the fact that punitive damages may lead to systemic change, it is of the view that the process might be slow and that it might require a substantial number of such awards before change is induced. Yet, such change could be achieved using equitable relief which is far cheaper and faster.¹³⁸

In the context of socio-economic-rights litigation, one cannot use only the situation of the litigants to judge whether the remedy of the court is an 'appropriate, just and equitable' remedy as is suggested by some authors.¹³⁹ Instead, one should assess the overall impact of the remedy on the state's policy or policies touching on the right in issue. One should ask, for instance, whether the state has overhauled its policy to reflect the elements of a reasonable policy as defined by the CC. Taking the example of the *Grootboom* case:¹⁴⁰ the judgment may not have resulted in tangible goods and services for the Grootboom community, but, generally, the decision has forced government to shift its housing programme to have regard to the needs of people in intolerable conditions and those threatened with eviction.¹⁴¹ Government has adopted an emergency housing policy to cater for people who may find themselves in situations similar to that of the Grootboom

¹³⁴ See section 2.2 above.

¹³⁵ See generally the *Rail Commuters* case supra note 64.

¹³⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (*Fose* case) para 71.

¹³⁷ *Ibid* para 71.

¹³⁸ *Ibid* para 65(d).

¹³⁹ See Swart op cit note 77 at 216.

¹⁴⁰ Supra note 99.

¹⁴¹ Geoff Budlender 'Justiciability of socio-economic rights: Some South African experiences' in Yash Ghai & Jill Cottrell (eds) *Economic, Social and Cultural Rights in Practice* (2004) 33 at 41.

community.¹⁴² Whether such policy is being implemented, though relevant, is another issue. The important point here is that the judgment has provided advocates of socio-economic rights with a tool to assess the reasonableness of government’s socio-economic programmes.

It should be noted, however, that not all remedies directed at the individual are irrelevant. There are cases in which a remedy, though directed at the individual, has the potential to advance the interests of society as a whole. This is especially so where the remedy has the potential to play an effective deterrent role and to benefit similarly situated people. In the *Hoffman* case,¹⁴³ though the remedy appeared to be directed at the individual victim, the CC was convinced that it would benefit similarly situated people. In this case, the court considered instatement of prospective employee denied employment because of his HIV status to be the most appropriate relief.¹⁴⁴ The CC held that

[an order of instatement] . . . is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered’.¹⁴⁵

However, the Court was quick to add that the remedy would have wider application beyond the individual victim and would only be granted where practicable.¹⁴⁶ It observed that instatement would serve a general deterrent role as it strikes effectively at unfair discrimination. This is because ‘[i]t sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance’.¹⁴⁷ It could, for example, be argued that large corporations may have been willing to pay extensive financial compensation in lieu of employing HIV/AIDS positive persons.

The approach in the *Hoffman* case shows that courts should not be dismissive of an individualized remedy in its entirety if there is evidence that it would have wide implications by, for instance, promoting deterrence. This is because deterrence forestalls future violation of the rights which benefits society as a whole.

IV CONCLUSION

It is important that, in our critique of the remedies granted by the courts in constitutional litigation, we should seek to understand the mode of justice that they employ. Criticisms of the remedies granted by the CC on the

¹⁴² National Department of Housing *National Housing Code Part 3: National Housing Programme Chapter 12: Housing Assistance in Emergency Circumstances* April 2004, available at http://www.housing.gov.za/Content/legislation_policies/Emergency%20%20Housing%20Policy.pdf (last accessed 12 April 2006).

¹⁴³ *Supra* note 79.

¹⁴⁴ *Ibid* para 50.

¹⁴⁵ *Ibid* para 50.

¹⁴⁶ *Ibid* para 53.

¹⁴⁷ *Ibid* para 52.

ground that they fail to individualize socio-economic rights could wrongly be based on the perception of remedies having exclusively a corrective role. It needs to be understood that the realization of socio-economic rights in the sense of granting individual entitlements immediately may not be feasible in South Africa. At a seminar held at the end of May in 2006,¹⁴⁸ a participant questioned the usefulness of the *Grootboom* case if the plight of the people of the Grootboom community has not changed positively. This criticism, and others of a similar nature, stress the corrective role of litigation and negate its role in promoting distributive justice. There is agreement by many scholars in the area of socio-economic rights that the *Grootboom* case has helped positively to influence policy and legislation in respect of socio-economic rights.¹⁴⁹

The inclination of the South African courts toward the notion of distributive justice is an indication of the context in which the courts enforce human constitutional rights. provisions, including those that constitute socio-economic rights, cannot be construed outside the social, economic and political context in which the Constitution operates. The current South African context, characterized by high levels of poverty and constrained state resources, makes it impossible to grant everyone individual socio-economic goods and services on demand. There are wider societal interests that have to be considered — and these interests may dictate the negation of the individual interests of the litigant; and this is where distributive justice helps us understand the remedial approach of the courts.

¹⁴⁸ *Strengthening strategies for promoting socio-economic rights in South Africa*, held in Cape Town 29–30 May 2006, organized by the Community Law Centre, University of the Western Cape and the Norwegian Centre for Human Rights, University of Oslo.

¹⁴⁹ See Sandra Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 2 *Law, Democracy and Development* 159 at 177–80. See Kameshni Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* 225 at 256–7.