LITIGATING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

A choice between corrective and distributive justice

Christopher Mbazira

Pretoria University Law Press
PULP

2009

Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:

ABC Press
Cape Town

To order, contact:

PULP
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.za

Cover:

Yolanda Booyzen, Centre for Human Rights

ISBN: 978-0-9814124-7-4

UNIVERSITY
OF OSLO

Norwegian Centre for Human Rights

The financial assistance of the Norwegian Centre for Human Rights is gratefully acknowledged.

TABLE OF CONTENTS

PREFACE

As an international LLM Student, I was fascinated by the Bill of Rights in the 1996 Constitution of South Africa. The inclusion in the Bill of Rights of socio-economic rights as justiciable is one of the most outstanding features of the instrument. More fascinating is the position of the South African Constitutional Court and the approach it has adopted in giving meaning to the rights in the Constitution and its determination to ensure that the country breaks away from the legacy of racial discrimination and unconstitutional governance. It is against this background that I picked interest in studying the South Africa constitutional system and jurisprudence in depth. When the time came for me to register for my PhD at the University of the Western Cape, the subject of remedies for socio-economic rights, widely perceived as ineffective, stood out as a novel area of research. This book is therefore deduced from my PhD thesis titled 'Enforcing the economic, social and cultural rights in the South African Constitution as justiciable individual rights: The role of judicial remedies' completed at the University of the Western Cape under the supervision of Professor Pierre De Vos.

The Constitutional Court has handed down a number of novel decisions in socio-economic rights cases. The *Soobramoney, Grootboom* and *Treatment Action Campaign* cases all stand out. These cases have heralded a new paradigm in looking at issues around the realisation of socio-economic rights. As a matter of fact, however, legal scholars adoring the socio-economic rights jurisprudence are usually disappointed by the high levels of poverty prevalent in South Africa. The perception immediately created is that the jurisprudence is defective. Indeed, a number of academic scholars have criticised the jurisprudence, mainly on the basis of the Constitutional Court's reluctance to apply the notion of minimum core obligations, but also on the basis of the fact that the Court has issued very weak remedies.

In spite of the criticisms, there has not been any serious study of the practical and philosophical factors which dictate the types and impact of remedies the courts grant in socio-economic rights litigation. My PhD research was directed at filling this gap, by undertaking an in-depth study of the nature of the judicial remedies issued in constitutional litigation in general, and socio-economic rights litigation in particular. One of my conclusions is that we cannot understand the nature of judicial remedies courts grant without understanding the philosophical factors influencing these remedies defined, amongst others, by the mode of justice to which the courts are inclined. The choice of justice between corrective and distributive justice is determined by the context in which legal standards and norms are enforced. The South African context dictates resort to distributive justice because of the high levels of poverty and the immeasurable backlogs in this regard. This is in addition to the pressures on the public purse. This explains why remedies for socio-economic rights litigation have avoided conferring individual rights on

demand and instead defined the rights as collective to be realised in a programmatic manner.

ACKNOWLEDGMENTS

I would like to express my gratitude to Pretoria University Law Press for the decision to publish this book. The contribution of the independent anonymous reviewers who reviewed and commented on the manuscript for this book is also appreciated. The persons who contributed to my PhD research from which this book emerges, are once again acknowledged. Parts of my PhD thesis from which this book emerges have been published in the following journals, which I acknowledge:

(a) From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa (2008) 24 *South African Journal on Human Rights* 1

(b) Judicial enforcement of socio-economic rights in South Africa: Heightening the reasonableness approach (2008) 26(2) *Nordic Journal of Human Rights* 131

(c) Confronting the problem of polycentricity in enforcing the socio-economic rights in the South African Constitution, (2008) 23 *SA Public Law* 30.

(d) 'Appropriate, just and equitable relief' in socio-economic rights litigation: The tension between corrective and distributive justice (2008) 125 *South African Law Journal* 71

(e) Bolstering the protection of economic, social and cultural rights under the Malawi Constitution (2007) 1(2) *Malawi Law Journal* 220

(f) Translating socio-economic rights from abstract paper rights to fully-fledged individual rights: Lessons from South Africa (2006) 12(2) *East African Journal of Peace and Human Rights* 183. This journal is published by the Human Rights & Peace Centre, Faculty of Law, Makerere University.

The financial assistance of the Norwegian Centre for Human Rights is gratefully acknowledged.

July 2009

ABOUT THE AUTHOR

Christopher Mbazira obtained his PhD from the University of the Western Cape and his LLM in Human Rights and Democratisation in Africa from the University of Pretoria. He currently teaches at the Faculty of Law, Makerere University in Uganda and also practises law as an advocate of the Uganda Courts of Judicature. He is also a research fellow with the Community Law Centre, University of the Western Cape and has done research and co-ordinated some projects for the Human Rights & Peace Centre, Faculty of Law, Makerere University.

To my wife Sandrah and sons Benjamin and Solomon

CHAPTER 1

INTRODUCTION

The inclusion of economic, social and cultural rights (socio-economic rights) in the 1996 Constitution of South Africa (Constitution)[1] is aimed at advancing the socio-economic needs of the poor in order to uplift their human dignity.[2] The constitutional protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform society, amongst others, from a society based on socio-economic deprivation to one based on equal distribution of resources.[3] This is evidence of a commitment to establish a society based on equality in all respects including socio-economic wellbeing.

It was not until 1994 that South Africa adopted a bill of rights. Before this, human rights did not enjoy constitutional protection as justiciable rights.[4] The apartheid era was characterised by wide-spread socio-economic deprivation in all its forms. Even when provision was made for some socio-economic goods and services, these did not reach all the citizens because of the practices of racial discrimination. The white minority enjoyed access to better quality goods and services, while the black majority either had access to only poor quality services or did not have access to services at all.[5]

1 Constitution of the Republic of South Africa, 1996.

2 S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool to challenging poverty?' (2002) 2 *Law, Democracy & Development* 159 160.

3 See generally K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 352; and AJ Van der Walt 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* 253 255.

4 This is with the exception of the homelands that had been created as independent states for the blacks. Most homelands had adopted their own constitutions with a bill of rights. Nevertheless, these bills protected only traditional civil and political rights.

5 N Steytler 'Local government in South Africa: Entrenching decentralised government' in N Steytler (ed) *The place and role of local government in federal systems* (2005) 183 184.

It is within this context of deprivation and discrimination that the struggle for human rights was conducted. The struggle against apartheid was a struggle for both political and socio-economic equality. As early as 1955, the Freedom Charter (Charter),[6] in addition to civil and political rights, made the call for socio-economic justice. It called for the removal of restrictions on land ownership, and equal access to work, housing and education-related rights.[7] The Charter was later to become the blueprint for a future South African constitution with a bill of rights. It recognised the need for people to exercise their civil and political rights while having their socio-economic needs met as well. This book is not intended to go into the details of the events leading up to the inclusion of socio-economic rights in the Constitution. What is apparent, however, is that the inclusion of socio-economic rights in the Constitution was a product of much controversy. Socio-economic rights were rejected by some scholars on the basis of their conception as human rights and the role that the courts would play in their enforcement.[8]

The obstacles to the inclusion of socio-economic rights in the Constitution as justiciable rights were surmounted during the negotiation and drafting of the final Constitution. This was followed by the inclusion of a wide range of these rights on the same basis as civil and political rights in the Bill of Rights as justiciable rights. Subsequent attempts to block these rights during the certification of the Constitution also failed.[9]

The Constitution has received international acclaim for its inclusion of socio-economics rights as justiciable rights on the same basis as civil and political rights.[10] The Constitution's commitment to the protection of socio-economic rights is made clearer in the Preamble; it declares that the Constitution has been adopted so as to

6 The Freedom Charter, adopted by the Congress of the People at Kliptown on 26 June 1955, sourced at http://www.anc.org.za/ancdocs/history/charter.html (accessed 17 May 2005). The Charter was adopted by the liberation movements to exemplify what they considered to be the ideal bill of rights for South Africa. See generally N Steytler (ed) *The Freedom Charter and beyond: Founding the principles for a democratic South African legal order* (1991).

7 Education would be 'free, compulsory, universal and equal for all children'.

8 See generally D Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475; B de Villiers 'Socio-economic rights in a new constitution: Critical evaluation of recommendations of the South African Law Commission' (1992) 3 *Journal for South African Law* 421; South African Law Commission *Interim Report on Group and Human Rights* Project 58, August 1991; and South African Law Commission *Final Report on Group and Human Rights* Project 58, October 1994.

9 See *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) (*First Certification* case).

10 See K Yigen 'Enforcing social justice: Economic and social rights in South Africa' (2002) 4 *International Journal of Human Rights* 13; C Sunstein *Designing democracy: What constitutions do* (2001); and M Tushnet 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* 2.

lay the foundation for a democracy based on social justice and fundamental rights. The Preamble also includes a commitment to improve the quality of life of all citizens and to free the potential of each person.[11] To achieve these values, the Bill of Rights protects three categories of socio-economic rights: rights with internal limitations, rights without internal limitations and the negative rights, respectively.[12] As seen in chapter three,[13] the obligations engendered by these rights have been interpreted as justiciable. It is especially in respect of the first category that the Constitutional Court has developed the reasonableness review approach in order to give relief to those whose rights have been violated.

The realisation of socio-economic rights means amelioration of the conditions of the poor and the beginning of a generation that is free from socio-economic need. In this context, litigants in socio-economic rights litigation expect their victories to be followed by immediate amelioration of their socio-economic conditions. However, this may sometimes not be the case; court victories may either be followed by very minimal improvements or no improvements at all. While this state of affairs may be blamed on the normative construction of the rights, it has also been blamed on the weaknesses of the remedies ordered by the courts in socio-economic rights litigation.

11 In *S v Mhkungu* 1995 7 BCLR 793, the Constitutional Court held that the Preamble was not a mere aspirational and throat-clearing exercise of little interpretational value. Instead, it connects up, reinforces and underlines the text which follows; it helps to establish the basic design of the Constitution and indicates its fundamental purpose (para 112).

12 The first category of rights includes the right of everyone to have access to adequate housing (sec 26) and the right of everyone to have access to health care services, including reproductive health care, sufficient food and water and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance (sec 27). What is common with these rights is that they are all subject to an internal limitation. By this limitation, the state is required 'to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights' (secs 26(2) & 27(2)). The second category of rights protects what have been crafted as basic rights not subject to any internal limitations. These include children's rights to basic nutrition, shelter, basic health care services and social services (sec 28(1)(c)). They also include everyone's right to basic education (sec 29(1)), including adult education, and the rights of detained persons to adequate accommodation, nutrition, reading materials and medical treatment (sec 35(2)(e)). The commonality with this category of rights is that their realisation is not subject to the state taking reasonable legislative and other measures within its available resources to progressively realise them. The third category, the prohibition rights, prescribes a number of prohibitions, which include everyone's right not to be evicted from their home, or not to have their home demolished without an order of court made after considering all the relevant circumstances. Additional to this is the affirmation that no legislation may permit arbitrary evictions (sec 26(3)). The other right in this category is the prohibition of refusal of emergency medical treatment to anyone (sec 27(3)).

13 Sec 3(2).

Although the Constitutional Court has been praised for confirming the justiciability of socio-economic rights,[14] it has also been admonished for issuing remedies that are incapable of translating these rights into individual entitlements.[15] The Constitutional Court has also been criticised for its failure to develop a jurisprudence which is pro-poor.[16] To support these submissions, the case of *Government of the Republic of South Africa v Grootboom and Others*[17] has often been used as a point of reference. Many commentators are of the view that, even though the Grootboom community litigated successfully, their socio-economic condition has not improved dramatically.[18] The Constitutional Court has been admonished for its failure to exercise supervisory jurisdiction in order to ensure that the government carries out the judicial orders handed down against it.[19] It is criticisms of this nature that prompted this research.

This book is intended to examine, in depth, the foundations upon which the selection of judicial remedies is based. The author uses these foundations to critique the approach of the courts as regards remedy selection and enforcement mechanisms in socio-economic rights litigation. However, note is taken of the fact that finding effective judicial remedies for the violation of socio-economic rights is also influenced by deeper problems relating to their justiciability. Socio-economic rights are perceived by some as engendering only

14 Yigen (n 10 above) 21; Liebenberg (n 2 above) 177-178.

15 See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; T Roux 'Understanding *Grootboom* – A response to Cass Sunstein' (2002) *Constitutional Forum* 41 42; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484 485; S Liebenberg 'Violations of socio-economic rights: The role of the South African Human Rights Commission' in P Andrews & S Ellman (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 405 419; and M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* 473 483.

16 See M Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215 and S Liebenberg 'Basic rights claims: How responsive is "reasonableness review"?' (2005) 5 *ESR Review* 7.

17 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC). For a detailed discussion of this case, see ch 3 sec 3.2.

18 See K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy & Development* 225; Swart (n 16 above); and D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301.

19 See D Davis 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* 3, Davis (n 18 above); M Heywood 'Contempt or compliance? The *TAC* case after the Constitutional Court judgment' (2003) 4 *ESR Review* 7; Bilchitz (n 15 above); and Swart (n 16 above).

positive obligations, as opposed to the negative obligations engendered by civil and political rights.[20] Socio-economic rights are also perceived as vague and incapable of precise definition in terms of the obligations they engender.[21] This is in addition to assertions that they lack the essential characteristics of rights *per se*: They lack universality and are not completely available on the basis of one being a human being as their realisation is subject to a number of conditions.[22] These conditions, it is argued, include realisation of the rights progressively and subject to the available resources.[23]

The most controversial objection to the judicial enforcement of socio-economic rights, however, has been based on the doctrine of separation of powers. It has been submitted that socio-economic rights are by their nature ideologically loaded, and as a result politicise constitutionalism and the judicial task.[24] It is argued that the realisation of these rights involves making ideological choices, which, amongst others, impact on the nature of a country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices.[25] In contrast, civil and political rights are believed to be ideologically neutral and do not therefore politicise constitutionalism.[26] Judicial enforcement of socio-economic rights is also viewed as undemocratic because the judges are unelected, yet they set aside the decisions of

20 See C Dlamini 'The South African Law Commission's working paper on group and human rights: Towards a bill of rights for South Africa' (1990) 5 *SA Public Law* 96; J Didcott 'Practical workings of a bill of rights' in J Van der Westhuizen & H Viljoen (eds) *A bill of rights for South Africa* (1988) 59-60.

21 See A Neier 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* 1 3.

22 See generally M Bossuyt 'International human rights systems: Strengths and weaknesses' in K Mahoney & P Mahoney (eds) *Human rights in the twentieth century* (1993); M Cranston 'Human rights real and supposed' in D Raphael (ed) *Political theory and rights of man* (1967); and M Cranston *What are human rights* (1973).

23 B Robertson 'Economic, social and cultural rights: Time for a reappraisal' *New Zealand Business Roundtable* September 1997, first published in 1997 by New Zealand Business Roundtable, Wellington, New Zealand, sourced at http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm (accessed 23 January 2005).

24 See N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451 456; D Horowitz *The courts and social policy* (1977); and W Fletcher 'The discretionary constitution: Institutional remedies and judicial legitimacy' (1982) *Yale Law Journal* 635.

25 L Lester & C O'Cinneide 'The effective protection of socio-economic rights' in J Cottrell & Y Ghai (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 17 20; Horowitz (n 24 above) 18.

26 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 382 395.

the democratically elected representatives of the people.[27] Accordingly, the courts lack not only the institutional legitimacy, but also the institutional capacity to adjudicate socio-economic rights.[28] It has therefore been contended that the role of making decisions as regards the realisation of these rights should, in accordance with the doctrine of separation of powers, be preserved for the elected organs of state.[29]

Socio-economic rights are also believed to be beyond the capacity of the judiciary because of their polycentric nature. It is argued that a socio-economic rights decision has many repercussions implicating a number of interests of persons who may not be before the court. Accordingly, the courts do not have the capacity to appreciate and attend to all these interests.[30] Because of this lack of capacity, judicial decisions may have unintended consequences affecting such persons not before the court.

In spite of the inclusion of socio-economic rights in the Constitution, the above objections have endured and continue to have an impact on the way socio-economic rights are being enforced. Chapter three shows, for instance, that the Constitutional Court has

27 Neier (n 21 above) 2; Lester & O'Cinneide (n 25 above) 20; R Zulman 'South African judges and human rights' paper presented to the Supreme Court History Society, Queensland. Australia on 4 July 2001, sourced at http://www.courts.qld.gov.au/publications/articles/speeches/2001/Zelman040701.pdf (accessed 8 February 2006); A Sachs *Protecting human rights in a new South Africa* (1990). See also A Sachs 'A bill of rights for South Africa: Areas of agreement and disagreement' (1989) 21 *Columbia Human Rights Law Review* 13 25; and Didcott (n 20 above).

28 See A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in J Peris & S Kristian (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 131 140; C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1 24.

29 See J Cottrell & Y Ghai 'The role of the courts in the protection of economic, social and cultural rights' in Cottrell & Ghai (n 25 above) 58 89; E Mureinik 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* 465; and Lester & O'Cinneide (n 25 above). It is, however, demonstrated in this book that civil and political rights may be as ideologically loaded as socio-economic rights. Some of these rights touch on issues that relate directly to contested political space, like political representation. Such ideologically-loaded issues include, eg, the definition of such rights as the right to vote and the attendant understanding of the notion of democracy. There have always been many ideological arguments on the true meaning of the notion of democracy and whether the right to vote includes, eg, the right of prisoners to vote. See *August and Another v The Electoral Commission and Others* 1999 3 SA 1 (CC) and *Minister of Home Affairs v National Institute of Crime Prevention (NICRO) and Others* 2004 5 BCLR 445 (CC). This is in addition to the true meaning of multi-party democracy, and whether it sanctions legislation allowing for floor-crossing under a system based on proportional representation. See *United Democratic Movement v President of the RSA and Others (2)* 2002 11 BCLR 1213 (CC).

30 See L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353.

been very careful not to construe the rights in a manner that imposes undue financial burdens on the state.[31] It is also true that, to a certain extent, the approach of the Constitutional Court in constructing the socio-economic rights in the Constitution has been influenced by the doctrine of separation of powers.[32] The Court has in some respects chosen to defer to the executive and legislative branches of state on some issues and has avoided constructions that would put it in confrontation with these branches.[33] This reason has, for instance, been advanced as an explanation for the Constitutional Court's rejection of the minimum core obligations approach.[34]

The Constitutional Court's approach has not only been motivated by the need to avoid confrontation by defining the rights as conferring individual benefits, but is also conscious of its institutional incapacity to define the minimum core.[35] In this regard, the reasonableness review approach has been viewed as the most appropriate because it accommodates separation of powers concerns. The reasonableness review approach is believed to embrace the notion that a public body should be given appropriate leeway to determine the best way of meeting its constitutional obligations.[36]

Separation of powers concerns could also be used to explain the Constitutional Court's approach to defining what are considered to be 'appropriate, just and equitable' remedies for socio-economic rights violations.[37] It is especially at the remedial stage of litigation that concerns about the competence of the courts become pronounced.[38] The Constitutional Court has explicitly cautioned that, in determining an appropriate remedy, regard must be paid to the roles of the

31 See ch three sec 3.2.

32 M Pieterse 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882 903; Davis (n 18 above) 316-317.

33 T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92 96. See also D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 51.

34 Roux (n 33 above) 96. See ch three, sec 3.2.1.

35 *Grootboom* case (n 17 above) para 32.

36 C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South Africa Law Journal* 264 277. See also Sunstein: (n 10 above) 221-222; C Sunstein 'Social and economic rights? Lessons from South Africa' *John M. Olivin Law and Economics Working Paper No 124, Public Law and Legal Theory Working Paper No 12*, (Preliminary draft) sourced at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657> (accessed 20 May 2005); and S Liebenberg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 82.

37 I Currie & J De Waal *The Bill of Rights handbook* (2005) 197.

38 See P Shane 'Rights, remedies and restraint' (1988) 64 *Chicago-Kent Law Review* 531.

legislature and the executive in a democracy.[39] According to the Court:

> [A] consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.[40]

The need to defer to the other organs of state explains why the Court has rejected remedies such as the structural injunction. In *Minister of Health and Others v Treatment Action Campaign* (*TAC* case), for instance, the Court declined to grant a structural interdict because, in its opinion, 'the government has always respected and executed orders of this Court' and that there was 'no reason to believe that it will not do so'.[41]

1.1 Influence of corrective and distributive forms of justice

In this book, the author posits that in addition to the nature of socio-economic rights and the doctrine of separation of powers, the Constitutional Court's approach could be explained by the notion of justice to which the Court is inclined. In broad terms, the different remedial approaches adopted by the courts have been directed either by corrective or distributive forms of justice. The theory of corrective justice is based on the notion that victims be put in the position they would have been in but for the violation of their rights.[42] The corrective justice theory, based on the philosophy of libertarianism, is not concerned with the impact of the remedy on third parties and other interests. Its only objective is to restore the position of the victim. The distributive justice theory, on the other hand, represents that domain of justice concerned with the distribution of benefits and burdens among members of a given group.[43] Unlike the libertarian-based corrective justice, distributive justice is based on the philosophy of utilitarianism. A court inclined toward the distributive

39 *Minister of Health and Others v Treatment Action Campaign* 2002 5 SA 721 (CC) (*TAC* case) para 137.

40 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 1 BCLR 39 (CC) para 66. See also *Van Rooyen and Others v S and Others* 2002 8 BCLR 810 (CC) para 48.

41 Para 129.

42 See ch four sec 4.2.1. See also M Modak-Truran 'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law & Humanities* 250; and K Roach *Constitutional remedies in Canada* (1994) 3-17.

43 See ch four sec 4.2.2.

justice theory takes into consideration third party and other legitimate interests that may be affected by a remedy.[44] The tension between these two notions of justice is reflected not only in the remedies, but also in the arguments in support and those against socio-economic rights.

When examined critically, the arguments against socio-economic rights represent an objection to using property in a distributive manner, and promote the philosophy of libertarianism, which treasures civil and political rights.[45] In contrast, the arguments in support of socio-economic rights derive from the philosophy of utilitarianism. This philosophy is based not only on belief in an individual's wellbeing, but also lays emphasis on the common good of society and the wellbeing of all its members.[46] This philosophy supports socio-economic rights because it strengthens the argument that no member of society should live in deprivation. Society's resources have to be employed in a manner that realises the happiness of all in socio-economic terms.

To be able to critique the remedies granted in support of socio-economic rights, it is important for advocates of these rights to understand the philosophies of justice referred to above. Many of the criticisms of the remedies granted by the Constitutional Court in socio-economic rights cases are based on the failure of the remedies to realise the rights as individual rights. These criticisms, however, appear to unconsciously promote the notion of corrective justice and are oblivious to the fact that the decisions of the Constitutional Court are based on the ethos of distributive justice. The author contends in this book that this is because of the fact that the socio-economic

44 See M Sandel *Liberalism and the limits of justice* (1998) 16; K Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in J Berryman (ed) *Remedies, issues and perspectives* (1991) 19. Distributive and corrective forms of justice have had a great influence on a host of factors that determine the nature of the remedies selected by a court. These include such factors as the relationship attached to rights and remedies (see generally P Gewirtz 'Remedies and resistance' (1983) 92 *Yale Law Journal* 585); the form and procedures of litigation (see generally A Chayes 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* 1281); and the manner of implementing the remedies. In addition to this, they also influence the liability rules adopted to determine whether or not there is a wrong and whether the plaintiff has suffered as a result. It is therefore important that one understands these forms of justice and how they have influenced the courts in determining what they consider to be 'appropriate, just, and equitable' remedies.

45 See D Boaz 'The coming of libertarian age' (1997) 19 *CATO Policy Report*, sourced at <http://www.heartland.org/pdf/63011a.pdf> (accessed 25 June 2006); Sandel (n 44 above); J Garret *The limits of libertarianism and the promise of a qualified care ethic* (2004) sourced at <http://www.wku.edu/~jan.garrett/ethics/libcrit.htm> (accessed 25 June 2006); and A Ryan 'Liberalism' in E Goodin & P Pettit (eds) *A companion to contemporary political philosophy* (1995) 291.

46 J Rawls *Political liberalism* 16. See also S Scheffler 'Rawls and utilitarianism' in S Freeman (ed) *The Cambridge companion to Rawls* (2003) 426; and S Mulhall & A Swift *Liberals & communitarians* (1996) 10.

context demands that the rights be enforced in accordance with the theory of distributive justice.[47] Criticisms based on corrective justice by advocates of socio-economic rights may be self defeating because they fail to appreciate the reality as presented by the socio-economic context.[48] They demand redistribution of resources for the benefit of all yet when it comes to remedies they insist on resources being used maximally for the benefit of selected victims who are able to litigate.

1.2 Scope of this book

The study is based on the judicial enforcement of the socio-economic rights protected in the South African 1996 Constitution. The socio-economic rights in this regard include the right to an environment that is not harmful to health and wellbeing,[49] rights of access to land,[50] access to adequate housing,[51] access to health care services, sufficient food and water, and social security.[52] This is in addition to the children's rights to basic nutrition, shelter, basic health care services and social services,[53] and the right of everyone to education.[54] This notwithstanding, reference is made to case law dealing with civil and political rights. This is because some of the principles that the courts have enunciated in these cases apply to all constitutional litigation, including litigation in the area of socio-economic rights.

South Africa has been selected as the focus of this book because of its extensive protection and judicial enforcement of socio-economic rights. However, in spite of such protection and enforcement, the country still faces a number of challenges in the alleviation of poverty through justiciable socio-economic rights. In this respect, South Africa offers a number of lessons to be learnt not only by other domestic jurisdictions but also by international human rights bodies. Indeed, South Africa's socio-economic rights jurisprudence is being referred to in scholarly literature all over the world and may soon be cited by domestic and international judicial bodies. This means that, although the study is South African-based, it is deemed relevant to international and many other domestic

47 Ch five sec 5.2.
48 It is contended in ch five sec 5.2 that the socio-economic rights context is represented by the widespread poverty prevalent in South Africa. The majority of South Africans are socio-economically deprived and cannot afford to meet such basic needs as housing, food and health services. While there is a constitutional commitment to eradicate this deprivation, the state is financially constrained and cannot meet everyone's needs immediately.
49 Sec 24.
50 Sec 25(5).
51 Sec 26.
52 Sec 27.
53 Sec 28(1)(c).
54 Sec 29.

jurisdictions. Many of the challenges it addresses are not exclusive to South Africa. South Africa is merely presented as a 'guinea pig' for the domestic enforcement of socio-economic rights.

1.3 Work done in this field

Much has been written with regard to the recognition and enforcement of socio-economic rights as justiciable rights. This literature spans both international and domestic jurisdictions. At the international level, there is a plethora of literature touching on such subjects as the development of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the nature of the obligations it engenders.[55] Specific topics of study have included the nature of the obligations engendered by specific rights in ICESCR, such as the right to adequate food,[56] the right to the highest attainable standard of health,[57] the right to water,[58] and the right to education.[59] In the South African context, there is an excellent capture of the debates relating to the justiciability of socio-economic rights that preceded the adoption of the interim and later final

55 See eg K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999); M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995); M Sepúlveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003); P Alston & G Quinn 'The nature and scope of states parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 8 *Human Rights Quarterly* 156; and A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 35. See also M Craven 'The International Covenant on Economic, Social and Cultural Rights' in R Hanski & M Suksi (eds) *An Introduction to the international protection of human rights: A textbook* (1997); A Eide 'Economic, social and cultural Rights as human rights' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook*, (2001); K Raes 'The philosophical basis of economic, social and cultural rights' in P van der Auweraet *et al* (eds) *Social, economic and cultural rights: An appraisal of current European and international developments* (2002) 43; and A Chapman & S Russell (eds) *The core obligations: Building a framework for economic, social and cultural rights* (2002).

56 P Alston & K Tomasevski (eds) *Right to food* (1984); and A Eide (ed) *Food as a human right* (1984). See also Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food* (article 11) (twentieth session, 1999), UN Doc E/C.12/1998/5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 54 (2003).

57 Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health* (twenty-second session, 2000), UN Doc E/C.12/2000/4 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 85 (2003).

58 P Gleick 'The human right to water' (1998) 1 *Water Policy* 487. See also Committee on Economic, Social and Cultural Rights, General Comment 15, *The right to water* (twenty-ninth session, 2003), UN Doc E/C.12/2002/11 (2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 105 (2003).

59 F Coomans 'In search of the content of the right to education' in Chapman & Russell (n 55 above) 217.

Constitution.[60] In addition to this, a lot has been written on the nature of the obligations engendered by the socio-economic rights provisions in the Constitution. This scholarly work has also considered and critiqued the Constitutional Court's reasonableness review approach in enforcing these rights.[61]

In spite of this plethora of literature, only a handful of scholars have written on the subject of judicial remedies for the violation of socio-economic rights.[62] Though this literature has proved very useful in providing some insights for this study, it does not canvass the subject of remedies in a comprehensive manner; it is either written in a general manner or addresses very specific issues and not remedies in a general and comprehensive way. Nonetheless, reliance has been

60 See C Dlamini *Human rights in Africa: Which way South Africa* (1995); Van der Westhuizen & Viljoen (n 20 above); D van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1994); and Sachs (n 27 above). See also Davis (n 8 above); D Davis 'Democracy: Its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* 103; E de Wet *The constitutional enforceability of economic and social rights: The meaning of the German constitutional model for South Africa* (1996); De Villiers (n 8 above) 421.

61 See D Bilchitz 'Health' in S Woolman *et al* (eds) *Constitutional law of South Africa* (1996) 56A; D Brand & S Russell (eds.) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002); Sunstein (n 10 above); Brand (n 33 above); K Govender 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in S Buhlungu *et al* (eds) *State of the Nation: South Africa 2005-2006* (2005) 93; Peris & S Kristian (n 28 above); S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 33-1; Liebenberg (n 15 above); Bilchitz (2002) (n 15 above); Bilchitz (2003) (n 15 above); Davis (2004) (n 19 above); Davis (2006) (n 18 above); P de Vos 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution (1997) 13 *South African Journal on Human Rights* 67; Liebenberg (n 36 above); P de Vos 'The economic and social rights of children in South Africa's transitional Constitution' (1995) 2 *SA Public Law* 67; A Gabriel 'Socio-economic rights in the Bill of Rights: Comparative lessons from India' (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* 9; M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 78; Liebenberg (n 2 above); S Liebenberg 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *South African Journal on Human Rights* 232; and S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1.

62 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 325; Pillay (n 18 above); Swart (n 16 above); Heywood (n 61 above); W Trengrove 'Judicial Remedies for violations of socio-economic rights' (1999) 1 *ESR Review* 8; Tushnet (n 10 above); and K Roach 'Crafting remedies for violations of economic, social and cultural rights' in Squires *et al* (n 36 above) 111.

placed on general writings on the subject of constitutional remedies.[63] This is in addition to writings on specific remedies such as declarations, damages and injunctions.[64] This book is aimed at filling some of the gaps identified in the literature above.

1.4 Outline of this book

This book is divided into five chapters, excluding this introductory chapter and the conclusion. The book could be divided broadly into two parts: Part 1 (chapters 2 and 3) deals with objections to the judicial enforcement of socio-economic rights and the nature of the obligations they engender. In chapter two it is argued that socio-economic rights are as justiciable as civil and political rights. This chapter also illustrates the fact that, like civil and political rights, socio-economic rights engender negative obligations. It is also argued that civil and political rights also require resources to realise. The chapter, however, acknowledges that socio-economic rights may require more resources to realise because in most cases violations are in the form of failure to adopt affirmative measures. Chapter three discusses the institutional based objections to the judicial enforcement of socio-economic rights as based on the doctrine of separation of powers, democracy and the technical competence of the courts to adjudicate socio-economic rights. It is submitted that the institutional competence objections are based on a misconception of the notion of democracy and the doctrine of separation of powers. Democracy means more than majoritarian democracy and yet the courts are entitled to intervene in social justice matters in case of default on the part of other organs of state.

Part 2 (chapters 4, 5 and 6) deals with theoretical and philosophical foundations of judicial remedies and discusses the appropriateness of specific remedies. This part also analyses the

63 See J Berryman *The law of equitable remedies* (2000); A Burrows *Remedies for torts and breaches of contract* (1994); Roach (n 42 above); P Schuck *Suing government: Citizen remedies for official wrongs* (1983); G Treitel *Remedies for breach of contract: A comparative account* (1989); D Walker *The law of civil remedies in Scotland*, (1974); R Zakrzewski *Remedies reclassified* (2005); Cooper-Stephenson (n 44 above); Gewirtz (n 44 above); D Levinson 'Rights essentialism and remedial equilibration' (1999) 99 *Columbia Law Review* 857; Shane (n 38 above); C Sunstein 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* 749.

64 E Borchand *Declaratory judgments* (1941); O Fiss *The Civil rights interdict* (1978); J Cassels 'An inconvenient balance: The injunction as a Charter remedy' in Berryman (n 44 above) 272; Chayes (n 44 above) 1979; T Eisenberg & S Yeazell 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* 465; Fletcher (n 24 above); Note: 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard Law Review* 428; M Pilkington 'Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms' (1984) *Canadian Bar Review* 517; and Special Project 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* 784.

approach of the South Africa courts on the issue of remedies. Chapter four discusses the nature of the obligations engendered by the socio-economic rights in the South African Constitution and the approach the courts have taken in interpreting these rights. The chapter makes suggestions regarding the manner in which the minimum core obligations approach should have been applied by the Constitutional Court and the reasonableness review approach made more effective.

Chapter four sets out the philosophical basis of remedies, defined, amongst others, by the notions of corrective and distributive justice. It is argued that the kinds of remedies a court will deem appropriate are, among other factors, determined by the notion of justice which the court intends to promote. It is illustrated that corrective justice is individualistic, backward-looking, discreet and aimed at putting the victim in the position they were in before the violation. On the other hand, distributive justice has elements of communalism, is forward-looking and produces remedies with a broader perspective.

Chapter five illustrates the place of the South African courts with regard to the notions of justice described in chapter four. It is illustrated that the South African courts have inclined toward distributive justice as dictated by the socio-economic circumstances in which the Bill of Rights is enforced. The chapter illustrates the fact that the South African Constitution is itself encrusted with ethos of distributive justice as seen from the manner in which the socio-economic rights provisions are crafted. These provisions define the rights and impose limitations that cut back on the potential to enjoy the rights as individual rights; the rights are more programmatic than immediately available to individuals.

Chapter six discusses the structural interdict, whose emergence the author ascribes to the prominence of the notion of distributive justice. This chapter reviews the approach of the South African courts with regard to grant of the structural interdict, contrasting between the High Courts and the Constitutional Court. The biggest contribution of this chapter is its definition of a set of norms and principles that could guide the courts in determining when a structural interdict is appropriate.

CHAPTER 2

THE LEGAL NATURE OF SOCIO-ECONOMIC RIGHTS: ARE THEY CAPABLE OF JUDICIAL ENFORCEMENT?

2.1 Introduction

The adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] in 1966 encountered a number of obstacles. These related mainly to objections as regards the legal nature of socio-economic rights. A number of countries, mostly from the 'West', argued that these rights were incapable of legal enforcement because they are imprecise in nature and their realisation is dependent on resources. The rights were also perceived as engendering only positive obligations as opposed to the negative obligations engendered by civil and political rights. In contrast, countries, mainly from the 'East', argued for the legal protection of socio-economic rights. They looked up to these rights to guarantee people's socio-economic development and for the protection of the basic needs of the poor such as shelter, food, clothing, access to medical care and work.[2]

As a compromise position, ICESCR was adopted separately from the International Covenant on Civil and Political Rights (ICCPR).[3] This was in spite of earlier directions from the United Nations (UN) General Assembly (GA) that a single covenant incorporating both categories of rights be adopted.[4] The perceived distinction between the two categories of rights is also reflected in the manner in which their respective obligations are defined. The rights in ICESCR are to be realised progressively subject to the maximum of the available

1 *International Covenant on Economic, Social and Cultural Rights,* adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entered into force on 3 January 1976.

2 See generally M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998).

3 *International Covenant on Civil and Political Rights*, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entered into force on 23 March 1976.

4 See General Assembly Resolution 421 E (V), 14 December 1950, UN Doc A/1775 (1950).

resources.[5] However, in respect of the civil and political rights, the states undertook to respect and ensure these rights, no express limitations were placed on this obligation.[6] The distinction is also reflected in the enforcement measures provided for in the covenants. ICCPR was adopted together with an optional protocol establishing an individual complaints mechanism.[7] No such mechanism was put in place in respect of ICESCR. This was based on the misconception that the obligations engendered by the rights in ICESCR were incapable of judicial enforcement. They would only be realised through international co-operation and through the work of intergovernmental organisations. This is because it was thought that these rights required extensive state action.[8]

The objection to the judicial enforcement of socio-economic rights has taken two dimensions. The first dimension is what would for the lack of a more accurate term be described as the legitimacy dimension. The second dimension is the institutional competence dimension.[9] The legitimacy dimension objection is rooted in the traditional conception of the philosophical foundations of human rights and raises questions intended to contest the legitimacy of socio-economic rights as part of human rights norms. The question posed here is one of whether it would be legitimate to confer constitutional status on socio-economic rights in light of their nature.[10] In terms of this dimension, socio-economic rights can be viewed as illegitimate because they involve the redistribution of wealth and the intervention of the state in the free market economy. It is believed that neither the redistribution of wealth nor the

5 Art 2(1) of CESCR provides as follows:
'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

6 Art 2(1) of ICCPR provides as follows:
'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

7 Optional Protocol to the International Covenant on Civil and Political Rights adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, entered into force on 23 March 1976. This Protocol empowers the Human Rights Committee, as established by ICCPR, to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by a state party of any of the rights set forth in the Covenant (art 1).

8 S Liebenberg 'The interpretation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 33-1 33-12 to 33-13.

9 C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1 20.

10 Scott & Macklem (n 9 above) 21.

direction of the free market should be subjected to the discipline of the Constitution. The market economy is based on state non-intervention and endorses those aspects of human rights that protect individuals against the state. Socio-economic rights are believed to engender affirmative features, which makes them dangerous to the market economy.[11] As will be seen later, it is in essence suggested that civil and political rights are more legitimate and even consistent with the functioning of the market economy.

In terms of the institutional competence dimension, the judiciary is viewed as inappropriate to deal with the complex matters of social justice. This dimension, among others, draws on concerns of majoritarian democracy. Issues of social justice are viewed as matters whose determination is within the jurisdiction of the representatives of the people and not the unelected judges.[12]

This chapter analyses the arguments that have been advanced on the basis of the above objections. It is submitted in this chapter that the objections to socio-economic rights as justiciable rights are based on many wrong assumptions about these rights. These objections overstate characteristics which have moreover been found not to be exclusive to socio-economic rights. This chapter shows similarities between civil and political rights and socio-economic rights. This notwithstanding, the chapter also shows that there are certain features that are more prominent with respect to socio-economic rights and which impact on their implementation.

Furthermore, it is submitted in this chapter that the institutional competence objections are based on a misconception of both democracy and the separation of powers doctrine. The separation of powers doctrine has evolved since its conception; it is not possible to strictly apply the doctrine as initially conceived. And democracy should be understood beyond the notion of majoritarian democracy.

2.2 Legitimacy-based objections

2.2.1 Human rights engender negative obligations

Human rights are believed to derive from the inherent nature of human beings and, as fundamental freedoms, are universal and

11 Scott & Macklem (n 9 above) 23.

12 Scott & Macklem (n 9 above) 24. See also P De Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* 67 68.

belong to all human beings.[13] Historically, human rights have been conceived as a negative protection of the individual from the state.[14] The relationship between the state and its subjects has been viewed from the perspective of the citizen being guaranteed negative freedoms as derived from natural rights.[15] Natural rights are believed to focus on individual freedom and autonomy from the state based on the theory of individualism.[16] The state may not interfere with the individual's freedom and liberty.[17] Those who believe in this philosophy restrict human rights to those norms that engender negative obligations on the state. Opposition has been directed to socio-economic rights on the ground that they engender positive obligations.[18]

Negative and positive obligations for all categories

In remedial terms, it is important to understand whether an obligation is either negative or positive. This is because, generally speaking, negative violations call for negative remedies such as prohibitions, while positive violations call for positive remedies such as mandatory injunctions. It is also true that negative remedies are thought to be less intrusive into the executive and legislative domain, while positive remedies may be far more intrusive. Most courts in South Africa and elsewhere have, for instance, had no problem granting negative or prohibitory injunctions; yet they have been reluctant to issue positive

13 M Piechowiak 'What are human rights? The concept of human rights and their extra-legal justification' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights: A textbook* (1997) 3 5.

14 Locke submits that all individuals find themselves party to two social pacts: *pactum unionis* and *pactum subjectionis*. The first is aimed at the establishment of civil society, while the second constitutes a framework in terms of which individuals agree that a government has a duty to protect the natural rights of everyone. J Locke *Two treaties of civil government* (1967), as quoted by B de Villiers 'Social and economic rights' in D van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1995) 601.

15 K Raes 'The philosophical basis of economic, social and cultural rights' in P Van der Auweraet *et al* (eds) *Social, economic and cultural rights: An appraisal of current European and international developments* (2000) 48.

16 See generally C Macpherson *The political theory of possessive individualism: Hobbes to Locke* (1967). He goes to great lengths to expose this philosophy and criticises it for its focus on the individual to the exclusion of the society as a whole.

17 See G Peces-Barba 'Reflections on economic, social and cultural rights' (1981) 2 *Human Rights Law Journal* 281 281-283.

18 This argument was also advanced in South Africa by the South African Law Reform Commission. The Commission endorsed the position that civil and political rights are negative while socio-economic rights are positive, which makes them hard to enforce, a view which was supported by a number of legal scholars. See C Dlamini 'The South African Law Commission's Working Paper on group and human rights: Towards a bill of rights for South Africa' (1990) 5 *SA Public Law* 96. See also J Didcott 'Practical workings of a bill of rights' in J Van der Westhuizen & H Viljoen (eds) *A bill of rights for South Africa* (1988) 59-60, as quoted by the South African Law Commission in its Interim Report on Group and Human Rights (August 1991) Project 58 533.

or mandatory injunctions. This is because such negative remedies do not draw the courts into the controversies generated by ordering government to undertake affirmative action.[19]

It is therefore true that an order enjoining an activity by requiring the state to desist from doing something is seen as less complicated when compared to one enjoining affirmative action requiring the state to do or undo something.[20] This means that the wholesome acceptance of socio-economic rights as engendering only positive obligations risks these rights being labelled highly intrusive and as instruments that facilitate interference in the way government is run. However, negative violations may also attract positive remedies in certain circumstances and so may positive obligations demand negative remedies.[21]

It is also true that sometimes negative remedies may be as intrusive as positive remedies, and yet, in some situations, positive remedies may not be intrusive.[22] Forbidding government action by way of a negative injunction may intrusively constrain government action in the same way as a mandatory injunction. Consider, for instance, an order that stops government from building a road on somebody's land. If the government thinks the road a necessity, it will have to engage in positive action by getting alternative land and planning for the road on that land. Alternatively, government may have to pay compensation in order to expropriate the land, which in itself is affirmative action.

Socio-economic rights also engender negative obligations and civil and political rights engender positive obligations as well.[23] The obligations under ICCPR are not restricted to state abstinence but also extend to the obligation of the state to undertake specific activities

19 See ch six sec 6.2.

20 J Berryman *The law of equitable remedies* (2000) 40. See also K Cooper-Stephenson *'Principle and pragmatism in the law of remedies'* in J Berryman *Remedies, issues and perspectives* (1991) 35; and D Horowitz *The courts and social policy* (1977) 19.

21 K Roach *Constitutional remedies in Canada* (1994) 3-9. See also Berryman (n 20 above) 40.

22 Roach (n 21 above) 3-10 gives the example of damages, which are considered to be a positive remedy, yet there is a contention that they are intrusive (3-12).

23 See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) paras 70-71. See also M Sepúlveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 125-126; and D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 305.

to realise the rights.[24] Take the right to life, for example: It is not guaranteed by mere abstinence from unjustifiable taking of life. It is also guaranteed by putting in place a police force to maintain law and order and by establishing hospitals to treat illnesses. Additionally, it also requires building and staffing of courts and prisons to punish those who unjustifiably end life. To protect the rights to free speech and property requires a government apparatus whose construction and maintenance calls for a great deal of positive action.[25]

Similarly, the right to vote, a classical civil and political right, engenders both negative and positive obligations. In *August and Another v The Electoral Commission and Others*,[26] the Constitutional Court held that the right to vote as guaranteed by section 19(3) 'imposes a positive obligation upon the legislature and executive'.[27] This is because '[a] date for elections has to be promulgated, the secrecy of the ballot secured and the machinery established for managing the process'.[28] The Constitutional Court observed that it is for this reason that the Electoral Commission (Commission) is established with affirmative duties imposed upon it. The petition in this case was brought by two prisoners, on their own behalf and on behalf of other prisoners, to enforce their right to vote. Though the law did not exclude prisoners from voting, the Commission had not made any arrangements for the registration and voting of prisoners. The Constitutional Court found this to be a violation of the prisoners' right to vote and was also against the foundational value of universal adult suffrage on a common voters roll. The Commission was ordered to 'make all reasonable arrangements necessary to enable the applicants and other prisoners … to register as voters'.[29]

24 In its General Comment 3, the UN ESCR Committee has said that it considers it necessary to draw the attention of state parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that state parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. According to the ESCR Committee, this aspect calls for specific activities by state parties to enable individuals to enjoy their rights. This is obvious in a number of articles (eg art 3 which is dealt with in General Comment 4 below), but in principle this undertaking relates to all rights set forth in the Covenant. Para 1 of General Comment 3: *Implementation at the national level (art 2),* 29 July 1981 in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.7 12 May 2004. See also P Alston & G Quinn 'The nature and scope of States Parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 8 *Human Rights Quarterly* 156 172.

25 C Sunstein *Social and economic rights? Lessons from South Africa* (May 2001). Public Law Working Paper No 12, University of Chicago Law & Economics, Olin Working Paper No 124 available at http://paper.ssrn.com/sol3/papers.cfm?abstract_id=269657 (accessed 27 July 2004) 1.

26 1999 3 SA 1 (CC).

27 Para 16.

28 As above.

29 Para 42(3.4). Yet, as is demonstrated below, making such arrangements for prisoners to exercise their right to vote would require resources. See *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others* 2004 5 BCLR 445 (CC) (*NICRO* case).

The right to equality as guaranteed by section 9 also engenders negative and positive obligations on the part of the state. The section does not only impose a negative duty on the state not to discriminate on the basis of the listed grounds, but also imposes positive obligations. The state is required to promote the achievement of equality by adopting 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.[30] The effect of this provision is that it compels the state to look beyond the notion of formal equality and to embrace substantive equality, which cannot be achieved without positive measures being undertaken. Substantive equality requires the state to undertake positive measures to enable those who have suffered discrimination in the past to surmount the obstacles that hamper their enjoyment of the rights. This concept of equality therefore also challenges the notion that human rights provide only negative protection.[31]

Nevertheless, one needs to concede that, by and large, the fulfilment of socio-economic rights calls for more extensive state action in comparison to civil and political rights.[32] This is what makes judicial review of socio-economic rights far more difficult in comparison to civil and political rights. As already noted, generally, negative violations call for negative remedies and positive violations for positive remedies. In the *First Certification* case,[33] the Constitutional Court held that at 'the very minimum, socio-economic rights can be negatively protected from improper invasion'.[34] This notwithstanding, in most cases, the state's violation of socio-economic rights emerges from failure to take positive steps.[35] A socio-economic right violation can occur when the state engages in prohibited acts, but in the majority of cases it is always the failure to act that is under scrutiny. In contrast, in the majority of civil and political rights cases, the state is taken to task to explain why its action infringes a civil and political right. This should not be understood to mean that civil and political rights litigation does not challenge inaction. The issue is one of differences in degree, as is illustrated by the examples of the right to heath care and the right to liberty immediately below. [36]

30 Sec 9(2).
31 S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163 166.
32 De Vos (n 12 above) 71.
33 *In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC).
34 Para 77.
35 V Abramovich 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 *SUR - International Journal on Human Rights* 81-216 183.
36 See Abramovich (n 35 above) 183.

Maintenance of a health care system requires well co-ordinated action and community-wide participation. It also requires a great deal of resources and expertise. It is only the state that is well placed to meet these requirements.[37] Whereas a violation of this right may result from state negative interference, it mainly arises from inaction. There is a legitimate expectation that the state will put in place a functional health system. This requires the necessary expertise. The state is also expected to use its resources to build the necessary infrastructure. By using its expertise, the state will achieve co-ordination. The state will also use both its coercive and non-coercive means to achieve community participation where necessary.[38] All these processes call for a great deal of state positive action. The same may be said of other socio-economic rights, such as education, housing, water and food.

Some civil and political rights may require similar measures but in varying degrees. To realise the right to personal liberty, the state needs to restrain itself, which imposes a negative duty. However, the state may also require co-ordinated action to investigate and punish violators, which imposes a positive duty. This positive duty, however, may, generally speaking, not require the same level of co-ordination and community participation as does a health system. In terms of Sepúlveda's 'spectrum' of obligations,[39] this right will attract more negative points, while the right to health will attract more positive points. If these points are expressed in terms of resources, the right to health care will be more expensive. One may argue that maintaining a sound police force requires the same level of resources as maintaining a health care system. Whereas this is true, there is a major difference: The cost of maintaining a police force will result in the protection of other rights such as property, life, and protection from servitude. This results in spreading the costs with a high level of economies of scale. Maintenance of a health care system is different. It may protect life but not so many other rights directly, thereby restricting the economies of scale. This makes the right to health more expensive.

2.2.2 Universality of human rights

Cranston submits that socio-economic rights are not human rights because they lack the essential characteristics of *universality* and

37 There is no doubt that it is a human need that people enjoy good health. It is also true that this need should be met by the state. It cannot be left exclusively to the individual without state aid. This is because it requires a great deal of expertise and resources not at the individual's disposal.

38 This may include laws that prohibit practices that are harmful to health, and health education to encourage practices that promote good health.

39 See Sepúlveda (n 23 above) 125. See also Abramovich (n 35 above) 186-187.

absolutism.[40] Human rights are said to be universal if they accrue to every individual by virtue of their humanity rather than as a result of their position or role in society.[41] Socio-economic rights are said to accrue to classes of people and therefore lack universality. Additionally, it is submitted that socio-economic rights are not enjoyed by virtue of one's humanity. Cranston describes socio-economic rights as 'mere utopian aspirations'. On the other hand, civil and political rights are said to be morally compelling; they belong to a human being simply because he or she is human.[42]

Cranston's use of the notion of universality to discredit socio-economic rights, however, lacks merit. Both categories of rights have elements that focus on the individual as the beneficiary, but they also have elements that are intended to protect collective interests. A number of civil and political rights are only meaningfully enjoyed in groups. For instance, the freedoms of association and assembly become useful only when exercised by a group. Furthermore, groups of people can demand collective exercise of their civil and political rights. Members of the media profession may through their professional bodies demand respect for their freedom of speech. Academics, scientists, politicians, minority groups and artists, too, may make similar demands for freedoms of expression and association. Additionally, even the so-called collective rights empower the individual: Better health, freedom from hunger, and the proceeds of employment all benefit the individual in as much as they are also necessary for the promotion of societal cohesion. Accordingly, '[a]lthough human rights are rights of individuals ... they facilitate rational, non-violent change of existing communities by means of exercising democratic rights'.[43]

40 See M Cranston 'Human rights real and supposed' in D Raphael (ed) *Political theory and rights of man* (1967).

41 Craven (n 2 above) 13.

42 M Cranston *What are human rights* (1973), as quoted by K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (1999) 58.

43 Raes (n 15 above) 44. Raes's view can be likened to the African value-laden concept of '*ubuntu*' (discussed in detail in ch five section 5.2). This value views an individual as part of a bigger whole, who cannot live in isolation from society. It therefore calls for compassion, honesty, love and care in relationships between individuals. Human rights in South Africa have been integrated with this concept. See Sachs J in *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC). The views expressed by Orwin & Pangle are, therefore, misplaced. Orwin & Pangle argue that the introduction of socio-economic rights carries with it a danger of moving human rights away from the individual as the focal point. In their opinion, this will make it possible for the justification of infringements upon the individual's freedom in the name of the common good. They argue that this will be detrimental to the practical achievements of the established human rights tradition. C Orwin & T Pangle 'The philosophical foundation of human rights' in M Plattner (ed) *Human rights in our time – Essays in memory of Victor Baras* (1984) 16.

The individual is part of a bigger social entity though he or she enjoys some liberty to determine his or her fate.[44] Human rights, whether civil and political or socio-economic, are aimed at creating an environment in which individuals flourish and decide how they want to live. Nevertheless, in doing this, human rights do not isolate the individual from his society because such an environment can only be created through collective effort. It is in line with this that the notion of distributive justice, as discussed in chapter four,[45] becomes relevant and useful in human rights litigation. In finding remedies for the violation of human rights, a court basing its decision on distributive justice will focus beyond the needs of the individual victim. Consideration will also been given to the needs of other individuals and to the needs of society as a whole.

2.2.3 Absolutism and resources limitations

Absolutism is the notion that a right is available to all human beings on the ground of their humanity without any prerequisite conditions. Socio-economic rights are said not to be absolute. Instead, their realisation is subjected to conditions; unlike civil and political rights, their realisation is dependent on resources.[46] Bossuyt goes as far as submitting that civil and political rights can be realised immediately because their realisation does not require resources; all the state has to do is to abstain from infringing them.[47]

This opinion, however, is misconceived. The implementation of civil and political rights, just like the socio-economic rights, requires

44 According to Macpherson (n 16 above), society becomes a lot of free individuals related to each other as proprietors of their own capacities and of what they have acquired by their exercise. This notwithstanding, it consists of relations of exchange between proprietors, and political society becomes a calculated device for the maintenance of orderly relations of exchange. In the same line, Freeden submits that a crucial dimension of human nature is its dependence on social, historical and behavioural contexts and that this negative understanding of the obligations adheres to a further assumption about human rights as axiomatic, when it is merely optional. It presents individuals as self-determining, as best capable of preserving their own interest, as indeed self-developing. This evokes a theory of human nature as self-sufficient, independent and capable of rational pursuit of enlightened self-interest. It encourages an overly formal and abstract discussion of human rights. M Freeden 'Human rights and welfare: A communitarian view' (1990) *Ethics* 490, as quoted by De Villiers (n 14 above) fn 21 603.

45 Sec 4.2.2.

46 See M Bossuyt '*La distinction juridique entre les droits civil et politiques et les droit economiques, sociaux et culturels*' (The legal distinction between civil and political rights and economic, social and cultural rights) *Revue des Droits de l'Homme* ((1975) 8 *Human Rights Journal*) 783.

47 M Bossuyt 'International human rights systems: Strengths and weaknesses' in K Mahoney & P Mahoney (eds) *Human rights in the twentieth century* (1993) 52.

resources.[48] For the right to life to be protected, a police force and army have to be trained. They have to be equipped with the necessary logistics and require regular and adequate funding. For the right to a fair trial to be enjoyed, courts have to be built and staffed. The judges and members of the legal profession have to be trained. Legal aid has to be provided to the indigent; all this is done at state expense.[49] It is also true that not all levels of socio-economic rights require resources to be realised.[50] The right to join and belong to a trade union may only require state non-interference. So also is a person's freedom to seek employment or provide for his or her means of survival. This imposes on the state an obligation to respect the right; all that this obligation requires is state non-interference with the enjoyment of the right. This means that defensive or prohibitive remedies such as the prohibitory interdict can be invoked in socio-economic rights litigation in as much as they are used in civil and political rights litigation.

According to Wells and Eaton, using the Constitution in a defensive manner is not controversial as it imposes no cost: 'when someone raises the Constitution defensively … no issue arises as to why he or she is allowed to do so; no legitimate cost is inflicted by such a remedy'.[51] This submission derives from the perception of civil and political rights as being only negative and socio-economic rights as being positive. However, even if one were to assume this to be correct, it is not true that negative remedies do not have budgetary implications. Consider a case in which a litigant successfully asserts his or her right not to be detained under inhumane conditions. While the court may not expressly compel the state to improve the conditions of detention, this may be the ultimate action that the state must undertake. This is because, considering the public interest, release of the detainee may not be an option. Improving the conditions of detention, from inhumane to humane, may require a considerable amount of financial and other resources, meaning that, although the right in its assertion was defensive, its vindication has become offensive and requiring resources.

48 Alston & Quinn (n 24 above) 172. Eide has submitted that the argument that socio-economic rights require resources yet civil and political rights do not is only tenable in situations where the focus on socio-economic rights is on the tertiary level (duty to fulfil), while civil and political rights are observed on the primary level (duty to respect). In Eide's opinion, socio-economic rights can, in many cases, best be safeguarded by non-interference. A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 35 41.

49 K Yigen 'Enforcing social justice: Economic and social rights in South Africa' (2002) 4 *International Journal of Human Rights* 13 18.

50 Eide (n 48 above) 41.

51 M Wells & T Eaton *Constitutional remedies: A reference book for the United States Constitution* (2002) xxv.

2.2.4 Vagueness of socio-economic rights

The other objection to the enforcement of socio-economic rights is their vagueness. In some circles, socio-economic rights are seen as more indeterminate.[52] The provisions of ICESCR are said to be vague to the extent that a judge cannot determine the precise scope of the right, whereas the ICCPR provisions are said to be precise.[53] Similarly, it has been submitted by some scholars, even very recently, that socio-economic rights are merely broad assertions, which puts them in unmanageable territory for the courts.[54]

The most immediate response to this objection has been that civil and political rights are no different.[55] It is not true, as has been suggested, that civil and political rights mean exactly the same thing everywhere.[56] Some civil and political rights, such as freedom of speech, and the right to protection of human dignity or protection from inhuman and degrading treatment are also vague. Most importantly, however, where the vagueness of civil and political rights has partly been cleared up through many years of adjudication; socio-economic rights have not had a similar advantage.[57] This is one of the reasons why a complaints procedure to ICESCR has been adopted.[58] To deny the justiciability of socio-economic rights is to

52 Scott & Macklem (n 9 above) 45. See also B Andreassen *et al* 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in B Andreassen & A Eide (eds) *Human rights in developing countries 1987/88: A yearbook on human rights in countries receiving Nordic aid* (1988) 333 335. They argue that phrases such as 'just and favourable conditions of work', 'fair wages', a 'decent standard of living', 'safe and healthy working conditions', an 'adequate standard of living' and 'adequate food, clothing and housing', as used in ICESCR, do not greatly help analysts in determining the substantive contents of these rights, or measuring empirically the degrees of implementation of specific rights (335-336).

53 This objection has been maintained even presently. This is seen at the first session of the Open-Ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (Open-Ended working Group). Some delegates argued that some of the provisions of the Covenant are drafted in imprecise terms, which gives rise to a lack of predictability on the part of the Committee. See para 53 of the Report of the Working Group, UN Doc E/CN.4/2004/44, dated 15 March 2004.

54 See eg A Neier 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* 1 3.

55 Some of the delegates at the session of the Open-Ended Working Group argued that ICESCR does not differs from ICCPR in this respect; that it was for the interpreters of the treaty to apply a particular provision of the Covenant to concrete cases as is the practice of the ESCR Committee in considering state reports; UN Doc E/CN.4/2004/44 para 53.

56 Neier (n 54 above) 2 has suggested that the right to free speech, the right to assemble and the right not to be tortured mean the same thing all over the world.

57 See Sepúlveda (n 23 above) 132.

58 See P Alston 'No right to complain about being poor: The need for an optional protocol to the economic rights Covenant' in A Eide & J Helgesen (eds) *The future of human rights protection in a changing world: Fifty years since the four freedoms address: Essays in honour of Torkel Opsahl* (1991) 88. See also L Chenwi & C Mbazira 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) *ESR Review* 9.

limit the opportunities of elaboration of the obligations they engender.[59]

Like civil and political rights, socio-economic rights are also capable of clarification using the multi-layered obligations structure generated by all rights.[60] This structure has successfully been used within the UN to clarify the obligations engendered by the rights as has been done by the UN ESCR Committee with regard to the different socio-economic rights protected by ICESCR. This has been in the form of General Comments, which have extensively defined the scope of most of the rights.

The multi-layered structure imposes on the state the obligations to respect, protect, promote and fulfil the protected socio-economic rights.[61] These duties, define, in precise terms, the nature of the negative and positive obligations imposed on the state by each right. Yet, they apply to both civil and political rights and,[62] to a certain extent, blur the differences between civil and political rights and socio-economic rights. Additionally, as is seen in chapter three,[63] the South African courts have, through the reasonableness review approach, demonstrated that the obligations engendered by socio-economic rights are capable of judicial clarification. This, though, is not to suggest that the formulation of socio-economic rights is flawless. Some of the phraseology that the provisions entrenching these rights carry is, to some extent, problematic.[64]

2.3 Institutional competence based objections

2.3.1 Democracy, separation of powers and technical deficiency

The institutional competence-based objection to judicial enforcement of socio-economic rights has a political but also legal dimension. The political dimension, which is the most predominant, finds its place in the notion of democracy. It has been submitted that decisions regarding the allocation of resources and the prioritisation of needs should be left for the democratically elected representatives of the people. This is because of the political accountability that such representatives owe their constituencies. This is unlike the

59 L Scott 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81 88.
60 Scott & Macklem (n 9 above) 73.
61 See A Eide 'Universalisation of human rights versus globalisation of economic power' in F Coomans *et al* (eds) *Rendering justice to the vulnerable:* Liber amicorum *in honour of Theo van Boven* (2000) 99.
62 See M Nowak *Introduction to the international human rights regime* (2003) 48.
63 Sec 3.2.
64 See Andreassen *et al* (n 52 above) 333-335.

unaccountable and undemocratic courts which set aside decisions reached through a democratic process, and they, therefore, act in a countermajoritrian manner.[65]

However, those that pursue the objection from a political dimension could still find refuge in the legal dimension as based on the doctrine of separation of powers. Crudely put, following legal principles, every organ of government should only discharge those functions designated to it by the doctrine of separation of powers. It is at this stage that an intersection between objections based on the separation of powers and those based on the notion of democracy becomes evident. The objectors use the doctrine of separation of powers to submit that by their institutional character it is only the executive and legislature that are well suited to deal with socio-economic matters.[66]

Although the objections present themselves as objections to judicial review generally, they are more pronounced with judicial enforcement of socio-economic rights because of the perceived nature of the obligations engendered by these rights. It has been submitted that the questions that these rights give rise to, by their very nature, need to be resolved by debate through the established democratic systems.[67]

In South Africa, this objection was put forward by some legal scholars at the eve of transformation to the new legal order.[68] During the negotiations leading to the new legal order, it was contended that what South Africa needed was strengthening of its democracy. This required that the powers of enforcing the Constitution be conferred

65 A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962) 16-7. This objection has received support from other scholars such as J Ely *Democracy and distrust* (1980). Ely perceives the effect of judicial review as amounting to the courts telling the people's representatives that they cannot govern as they would like (4-5).See also W Bogart '"And the courts which govern their lives": The judges and legitimacy' in J Berryman (ed) *Remedies: Issues and perspectives* (1991) 49 56.

66 See generally Horowitz (n 20 above).

67 According to Neier, to withdraw these rights from the democratic process is to carve the heart out of that process. This is because everybody has an opinion on what should be done to protect public safety, and everybody has a view as to what is appropriate in the allocation of resources and economic burdens. In Neier's opinion, such questions should not be settled by some person exercising superior wisdom and who comes along as a sort of Platonic guardian and decides that this is the way it ought to be. Neier (n 54 above) 2.

68 See, eg, D Davis 'Democracy: Its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* 104. See also C Forsyth & M Elliot 'The legitimacy of judicial review' (2003) *SA Public Law* 286.

on democratically-elected institutions.[69] While consensus emerged that South Africa needed a bill of rights that also contained socio-economic rights, there was intense disagreement on the manner the enforcement of these rights should take.[70] As seen in chapter one, it was contended, among others, that making socio-economic rights justiciable would be juridically futile and would plunge the country into a serious constitutional crisis.[71] It was suggested that socio-economic rights be included in the Constitution as directive principles of state policy enforceable not by the courts but by the Human Rights Commission.[72] However, some scholars objected to this on the basis that it would have subjected the rights to the wishes of transient majorities as the principles would only serve as presumptions of statutory interpretation.[73] On the other hand, subjecting these rights to the wishes of the majority is exactly what the objectors were advocating.

This objection was fuelled especially by the nature of the legal system that had been in place for many years. Before 1994, the state adhered to the doctrine of parliamentary supremacy which upheld the legislature above all other organs. This doctrine, within legal circles,

69 One of the factors leading to this suggestion could be found in South Africa's history of political struggles. These struggles were launched mainly on the political front with little reliance on the courts to advance equality rights. Those fighting apartheid had very little faith in the judicial process as it was viewed by many as an accomplice to the promotion of racial discrimination. See H Klug *Constituting democracy: Law, globalism, and South Africa's political reconstruction* (2000) 30 47; J Dugard *Human Rights and the South African legal order* (1978); M Corbett 'Representations to the Truth and Reconciliation commission' (1998) 115 *South African Law Journal* 17; R Zulman 'South African judges and human rights' paper presented to the Supreme Court History Society, Queensland. Australia on 4 July 2001 sourced at http://www.courts.qld.gov.au/publications/articles/speeches/2001/ Zelman040701.pdf (accessed 8 February 2006); H Corder 'Seeking social justice: Judicial independence and responsiveness in a changing South Africa' in P Russell & M O'Brien (eds) *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 194 201; and Z Motala & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 75-78.

70 See A Sachs *Protecting human rights in a new South Africa* (1990) 20. See also A Sachs 'A Bill of Rights for South Africa: Areas of agreement and disagreement' (1989) 21 *Columbia Human Rights Law Review* 13 25; and Didcott (n 18 above).

71 See SALC Interim Report (n 18 above) 664.

72 South African Law Commission (SALC) *Final Report on Group and Human Rights*, Project 58, October 1994 (SALC Final Report) 195. See also D Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475.

73 See E Mureinik 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *South African Journal on Human Rights* 464. Scott & Macklem (n 9 above) 39-40 warned that, if social rights are phrased merely as directive principles of state policy or as state responsibilities or obligations, a political discourse may emerge that avoids notions of individual need and entitlement and instead remains at the level of generalised policy considerations. This would carry the risk of treating individuals as abstract, passive units of policy and not as active agents suffering hardship with legitimate claims of constitutional right. Sunstein warned that directive principles would be mere 'parchment barriers', meaningless, empty and could not protect human rights. Sunstein (n 25 above) 3. See also De Villiers (n 14 above).

nurtured and sustained a culture of legal positivism. Lawyers and judges became 'mechanics' of the law and applied it in a manner that adhered to its letter and the strict intention of parliament.[74] What this meant was that the capacity of the courts to develop the law in order to advance human rights was limited, which was also exacerbated by the absence of a bill of rights in the Constitution. For those who opposed the judicial enforcement of socio-economic rights, such a legal background provided very fertile ground for their objections to flourish.

In spite of the adoption of a Constitution containing justiciable socio-economic rights, the enforcement of these rights has not been a smooth ride; as courts assume the complex task of enforcing the rights problems have arisen. The objection has shifted from separation of powers and democracy concerns to questioning the democratic nature of the courts and whether they have the technical capacity to perform certain tasks. This dimension of the objection should be distinguished from the one based on democracy as discussed above. The question raised by the technical deficiency objection is very practical; it is not whether the courts should perform certain tasks, but whether they can perform those tasks competently.[75] It should be noted, however, that there is a point where these two objections may intersect; the objection based on democracy is partly based on the fact that questions arising from socio-economic rights issues can by their nature only be decided by democratically-elected institutions. This is because, as seen above, these institutions are believed, unlike the courts, to be accountable to the electorate.

74 See J Sarkin 'The political role of the South African Constitutional Court' (1997) 114 *South African Law Journal* 134; and A Chaskalson *et al* 'The legal system in South Africa 1960-1994' Representations to the Truth and Reconciliation Commission (1998) 15 *South African Law Journal* 21 32. See also D Moseneke 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309 316 (paper presented at the Fourth Bram Fischer Memorial Lecture at Nelson Mandela Civic Theatre, Johannesburg, 25 April 2002); Dugard (n 69 above) 19 35; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147 151; P Gready & L Kgalema 'Magistrates under apartheid: A case study of the politicisation of justice and complicity in human rights abuse' (2003) 19 *South African Journal on Human Rights* 141; and A Chaskalson 'Law in a changing society' (1989) 5 *South African Journal on Human Rights* 293. For case law in this regard, see *Mpangele and Another v Botha* 1982 3 SA 638 (C); *In re Dube* 1979 3 SA 820 (N); and *Sachs v Minister of Justice* 1934 AD 11.

75 Horowitz (n 20 above) 18. See also C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264 270. Steinberg submits that the primary issue is not whether the judiciary may legitimately engage in evaluations of socio-economic rights as it is already constitutionally obliged to do so. Instead, the task is to define the most effective and appropriate role of the judiciary, taking into account both pragmatic and principled considerations, including the inherent limitations of the process of adjudication and the place of other institutions.

On the other hand, while the technical deficiency objection also invokes the questions raised by the nature of socio-economic rights, it is based not on democratic accountability, but on the fact that the courts just lack the technical skills to answer these questions.[76] The objectors trust that both the legislature and the executive have such skills and in accordance with the principles of separation of functions, should exercise the powers to answer these questions. This is because social justice gives rise to such issues as the prioritisation of the distribution of resources and balancing of opposing interests.[77] The courts are considered to be ill-suited to make strategic choices among means and therefore they lack the necessary technical capacity to determine issues of social justice. Their capacity to determine the scale of preference of needs in the context of scarce resources is doubted. Additionally, the realisation of socio-economic rights is believed to require special expertise because of their budgetary implications.[78]

As is subtly expressed by Sachs, the objection is based on the inherent characteristics of the judiciary:

> The objection from radical quarters to judges enforcing social and economic rights suggests that we are likely to get it all wrong. They point to the social class from which we judges traditionally have been drawn, and the nature of our legal thinking which tends to look at questions in abstract and in formulaic ways that end up favouring the *status quo*. But even where our background and modes of thought might predispose us differently, there can be little doubt that it is inappropriate for judges who in general know very little about the practicalities of housing, land and other social realities, to pronounce on these issues. That is what parliament is there for.[79]

76 M Tushnet 'Enforcing social and economic rights' (unpublished paper on file with author) 122. See also M Tushnet 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* 3-6; M Tushnet 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas Law Review* 1895; and C Sunstein 'Against positive rights' (1993) *East Europe Constitutional Review* 35, excerpt in H Steiner & P Alston *International human rights in context: Law, politics, morals* (2000) 281.

77 Abramovich (n 35 above) 183.

78 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 394. See also Scott & Macklem (n 9 above) 24. Mureinik (n 73 above) 465 has summarised the essence of this argument as relating to judges' capacity to evaluate budgets. He writes that judges do not have a budget and they are not qualified to evaluate how much it is necessary to spend, nor how much society can afford, nor what its priorities are, or ought to be. In his opinion, answering questions such as these is essential for the decision maker to have both expertise and political accountability and that this is why these tasks are assigned to the legislature and executive.

79 A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in J Peris & S Kristian (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 131 140.

It is for the above reason that some scholars object to remedies that require courts to make decisions on issues that require making socio-economic-related choices.[80] This is in addition to a greater involvement in making what appear to be policy choices. It is indeed because of the fear of getting involved in administrative and policy issues that courts are reluctant to retain remedial jurisdiction and continued supervision of their orders.[81] Courts are more comfortable making final determinations of disputes and to avoid a multiplicity of suits touching on the same subject matter and parties. This is because this would make it inevitable for them to intrude deeply into functions that are considered the preserve of other organs of state.[82]

2.3.2 Democracy and separation of powers is overstated

It is important to note that those who pursue the institutional competence objection in addition to misconceiving the doctrine of separation of powers have a very restrictive understanding of the notion of democracy. Democracy is not just about the vote, but also encompasses such notions as constitutionalism and the rule of law. This is because of the need to protect the rights of minorities and the values they believe in. It is also submitted that both the rule of law and constitutionalism impose many restrictions on the manner in which government, and the majority for that case, conduct their business. It is the responsibility of the courts to enforce these restrictions when an infraction is brought to their attention.

According to Devenish, constitutional democracy is a complex phenomenon of political morality in which the majority, the minority and individuals have rights and obligations.[83] Constitutional democracy, in as much as it should preserve the wishes of the majority, should also protect minority rights by obligating the majority to respect the values and interests of minorities.[84] In such a setting, judicial review will protect the interests and rights of the minority by checking those missteps of the majority with the potential

80 J Cassels 'An inconvenient balance: The injunction as a Charter remedy' in Berryman (n 20 above) 289.

81 See ch 6 sec 6.3.

82 The courts fear to lose the support and legitimacy they enjoy from the other organs of state. They fear that should they intrude deeply into the functions of the other organs, these organs may respond by reducing the powers of the judiciary or squeezing their purse. It is therefore correct that the issuance by courts of orders whose compliance they cannot secure is a threat to the court's legitimacy. This is because of the fact that the courts have 'the power "neither of the sword nor the purse" which makes it necessary to be sensitive to the maintenance of … [their] own authority and legitimacy.' Cassels (n 80 above) 289.

83 G Devenish *A commentary on the South African Bill of Rights* (1999) 4. See also G Kateb 'Remarks on the procedures of constitutional democracy' in J Roland & J Chapman (eds) *Constitutionalism: Nomos XX* (1979) 148.

84 See *Larbi-Odam and Others v MEC for Education (North West Province) and Another* 1997 12 BCLR 1655 (CC) para 28.

of violating minority rights.[85] Minority groups must be protected and afforded the opportunity to enjoy the benefits provided by the democratic process.[86] Majoritarian democracy has the danger that, once the majority have assumed power, if not checked, they 'tend to marginalise minorities in such a way that minorities are effectively unable to express their views'.[87] In *State v Makwanyane*,[88] the Constitutional Court observed that the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.[89]

Furthermore, those who support majoritarian democracy sometimes turn a blind eye to some of its inherent weaknesses. Majoritarian democracy is, for instance, seldom exercised directly but is instead exercised through representatives, with a few individuals chosen to represent the majority. However, it is not always the case that, in all situations, the representatives will represent and be responsive to the wishes of their constituencies. Instead, their decisions are usually influenced by other factors such as selfishness, political manoeuvring and political party interests in multi-party democracies such as South Africa. Indeed, sometimes elected representatives have much more power than citizens to determine political decisions.[90] In such situations, both the majority and the minority will be better protected by relying on the courts to force

85 See A Hamilton 'The Federalist No 78' in C Rossiter (ed) *The Federalist Paper* (1961) 464. See also J Kentridge & D Spitz 'Interpretation' in A Chaskalson *et al* (eds) *Constitutional law of South Africa* (1995) 11-1 11-21. This theory finds its source in the famous footnote 4 to the United States case of *United State v Carolene Products Company,* 304 US 144 152, 58 SCt 778 (1938). In this footnote, the Court said that the appropriateness of statutes that are directed at curtailing the operation of particular religious or national or racial minorities may be questioned by the Court.

86 D Davis *et al* 'Democracy and constitutional interpretation' in D van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1994) 2.

87 D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 104.

88 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC).

89 Para 88. See also *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC). The Constitutional Court observed that it might well be that pluralistic society members of large groups can easily rely on the legislative process than those belonging to small groups. The Court went on to hold that the minorities may have to rely on constitutional protection, particularly if they express their beliefs in a way that the majority regard as bizarre or even threatening (para 25).

90 Bilchitz (n 87 above) 106.

their representatives to account to them.[91] Unlike the politicians, the judges are insulated from the political pressures and their professional ideals allow them to decide matters in a more dispassionate and impartial manner.[92] They will therefore be able to entertain and consider in a more or less impartial manner the complaints of aggrieved members of society who may consider themselves to have been let down by the political process. Such persons may have been prevented from participating in the political process by weaknesses such as lack of political power or economic disadvantage. [93]

It should also be noted that, simply because a government has been constituted by the majority does not mean that it exercises its powers without restrictions. A constitution, while giving adequate powers to the elected representatives of the people, should also structure political power in a manner that prevents abuse.[94] This is the essence of the doctrine of constitutionalism. This doctrine requires that government powers be limited to those set out in the

91 Abramovich (n 35 above) 197. South Africa offers a good example of the deficiencies of representative democracy. By the South African system of proportional representation, the voters cast their votes for political parties with the hope that the political parties will represent their wishes. However, the system does not establish clear legal processes through which the voters can hold the political parties to their promises. Instead, the voters will have to wait for another election to remove those parties that did not fulfil their election promises. Many irremediable wrongs may have occurred during this waiting period. This problem is made worse by the fact that the political parties have a highly centralised decision-making system. Decisions are taken by the political mantle of the party consisting of the elitist leadership. While decisions may be influenced by such pressure groups as labour unions, these pressure groups are sometimes highly patronised by the leadership.

92 A Chayes 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* 1281 1307-1308. See also Sachs (n 79 above) 139-140.

93 Davis *et al* (n 86 above) 2.

94 K Govender 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in Buhlungu *et al* (eds) *State of the Nation: South Africa 2005-2006* (2005) 93 97. Limitation of political powers is made more pertinent by the history of South Africa. South Africa experienced decades of dictatorial and discriminatory rule which had been sustained, among others, by the constitutional system of parliamentary supremacy. This constitutional system had produced a government that enjoyed a clear majority in the legislature in spite of the fact that it comprised of the minority white group. The constitutional system did not produce any real restrictions of power to forestall abuse. Generally, the judiciary was controlled by the executive and did not have powers to review the activities of the other organs or to test them against established constitutional standards. To turn this page in history, South Africa needed a supreme constitution that effectively provides protection against abuse of power. This is exactly what the 1996 Constitution does. For a detailed discussion of South Africa's constitutional history, see Dugard (n 69 above); and E Hassen *The soul of a nation: Constitution making in South Africa* (1998) Oxford 5-27.

constitution.[95] This limitation takes two forms; First, it restricts the range of things which the different organs of government can do, thereby defining their competence. Second, it prescribes the procedures that must be followed in exercising the competences.[96]

Constitutionalism forestalls abuse of power by guaranteeing fundamental rights and liberties and protecting them in a bill of rights. The bill of rights plays a very important role in promoting constitutionalism by excluding power excesses that would violate the rights and liberties of the individual.[97] A bill of rights may require the state to fulfil positive aspects of rights and proactively to safeguard the environment in which these rights are enjoyed.[98] The state may be compelled to pass legislation that elaborates these rights and sets up administrative mechanisms through which they can be implemented and enforced.

The judiciary's role becomes one of upholding the constitution and reminding the other branches of government of the limitations on their powers. This is necessary for the protection of the rights and the liberties of individual.[99] The judiciary will demand that the other

95 I Currie & J de Waal *The new constitutional and administrative law* (2001) 10. These authors contrast constitutionalism with the arbitrary rule of an aristocracy or dictatorship. Such leadership is not subjected to any rules, but is instead directed by the personal whims of the leader. See also I Currie & J de Waal *The Bill of Rights handbook* (2005) 8; and Motala & Ramaphosa (n 69 above), 176 who define constitutionalism as standing for limited government and seeks to introduce certain substantive and institutional limits to restrict the scope of governmental power.

96 Currie & De Waal (n 95 above) 10.

97 See Sachs (n 70 above) 9-10, where he gives the example of the *Magna Carta*, the United States Bill of Rights and the French Declaration of the Rights of Man as having been adopted by the oppressed as a means of controlling the power of the former oppressors and guaranteeing freedom from future oppression. Elsewhere, Sachs has submitted that the very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being and that it is incumbent on the courts to see to it that basic respect for every person is maintained at all times. In Sachs's opinion, this is the reason we have fundamental rights. Sachs (n 79 above) 139.

98 According to Devenish (n 83 above) 9, the positive obligations engendered by the South African Bill of Rights are of demonstrable significance for the process of democratic and egalitarian transformation from exclusive white privilege to the economic and social rehabilitation of disadvantaged communities.

99 S Sullivan 'The role of the independent judiciary' in *Freedom Paper No 4*, sourced at http://usinfo.state.gov/products/pubs/archive/freedom/freedom4.htm (accessed 19 January 2006) 2 .

branches justify their policy choices, programmes and legislation,[100] and where these cannot be justified, to rule them out of order. Policy and legislation must be justified as ultimately leading to the promotion of the fundamental values, and the realisation of the rights in the bill of rights. The judiciary will stand out as the guardian of the constitution and the system of democratic values which involves the protection of the individual and the rights of minority groups.[101] This becomes particularly relevant because of the powerful nature of the state *vis-à-vis* its subjects. Countering this power requires an independent branch with powers to hold the other branches accountable.[102] The subjects will look to the judiciary to ensure accountability and protection of their interests.[103] The judiciary should be able to uphold the constitution and to set aside any law or conduct inconsistent with the constitution.[104] It is on this basis that Sachs submits that, in situations where political leaders may have difficulty withstanding populist pressures, and where human dignity is most at risk, it becomes an advantage that judges are not accountable. According to Sachs, it is at these moments that the judicial function expresses itself in its purest form. The judges, able

[100] Mureinik described the new South African constitutional order as a bridge away from the culture of authority that accompanied the apartheid era as a culture of justification. E Mureinik 'A bridge to where? Introduction to the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31. In Mureinik's opinion, the Constitution must lead to a culture of justification, 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command' (31). Indeed, the 1996 Constitution envisions a society based on accountability, responsiveness and openness as one of the fundamental values (sec 1). Pieterse has added that this culture of justification should extend to the exercise of power in the socio-economic realm, where government power may impact on the enjoyment of several fundamental rights. This would demand that government justifies its choice of policy options and any limitations or negations from socio-economic rights. Similarly, Fredman submits that respect for the democratic process requires greater attention to the duty to account and explain. In Fredman's opinion, the duty to account exposes decisions makers to justifiable public scrutiny in addition to improving deliberative dimensions of decision making; it also prevents polarised decision making. Fredman (n 31 above) 175.

[101] Devenish (n 83 above) 4. See also Davis *et al Fundamental rights in the Constitution: Commentary and cases* (1997) 3; and Cachalia *et al Fundamental rights in the new Constitution* (1994). This is what Bilchitz (n 87 above) 105 calls rights-based justifications of judicial review which involves the view that there are fundamental rights that must be guaranteed to all individuals in any just society, whether or not the majority agrees or wishes to recognise these rights.

[102] M Cappelletti 'Judicial review of the constitutionality of state action: Its expansion and legitimacy' (1992) 2 *Journal of South African Law* 256 257.

[103] Pieterse (n 78 above) 388. See also S Liebenberg 'Needs rights and transformation: Adjudicating social rights' Center for Human Rights and Global Justice Working Paper No 8, 2005 10, sourced at http://www.nyuhr.org/docs/wp/Liebenberg%20-%20Needs,%20Rights%20and%20Transformation. pdf (accessed 23 March 2006).

[104] See *Marbury v Madison* 5 US 137, 2 LED 60 (1803), sourced at http://www.lectlaw.com/files/case14.htm (accessed 12 November 2005) (*Madison* case).

to rely on the independence guaranteed to them by the Constitution, ensure that justice is done to all without fear, favour or prejudice.[105]

It is important to note, however, that for the courts to successfully discharge their functions they also require a great deal of support from the other organs of state. If the executive receives court directions with hostility and unwarranted criticism, the mutual respect between it and the judiciary will be destroyed.[106] Such hostility makes it hard for the judiciary to effectively and freely discharge its functions. This is because the courts are highly dependent on the executive for survival and enforcement of their orders as they have neither the power of the sword nor the purse. Lack of support or hostility from the executive will erode the legitimacy of the judiciary and deepen the counter-majoritarian dilemma.[107]

The doctrine of constitutionalism is complemented by the long-established principle of the rule of law. According to Dicey, the rule of law comprises three fundamental tenets. The regular law of the land is supreme, so that individuals should not be subjected to arbitrary power; state officials are subject to the jurisdiction of the ordinary courts of the land in the same manner as individuals; and the constitution is a result of the ordinary law of the land so that courts should determine the position of the executive and bureaucracy by principles of private law.[108] In its most elementary form, the rule of law demands that everything government does must be authorised by the law.

However, over the years, this principle has seen tremendous development. It will not allow government conduct to pass simply because it has been authorised by law if it violates fundamental rights and liberties. Even in those countries without written constitutions, like the United Kingdom, the principle of the rule of law has led to the development of certain restrictions to the exercise of public power akin to those imposed by constitutions. In contrast, countries with written constitutions such as South Africa have merely co-opted the principle of the rule of law by applying it simultaneously with the

105 Sachs (n 79 above) 139.

106 See generally G Kanyeihamba 'The culture of constitutionalism and the doctrine of separation of powers' paper presented at the Public Lecture on State of Separation of Powers in Uganda, organised by the Human Rights and Peace Centre, Faculty of Law, Makerere University, 15 March 2007, available at http://www.huripec.ac.ug/Guest_Lecturers.pdf (accessed 10 October 2007).

107 See M Corbett 'Human rights: The road ahead' in C Forsyth & J Schiller (eds) *Human rights: The Cape Town conference* (1979) 6.

108 A Dicey *Introduction to the study of the law of the constitution* (1885) (1982) 1. See also R Brewer *Judicial review in comparative law* (1989) 90.

doctrine of constitutionalism.[109] The principle of the rule of law therefore strongly compliments the doctrine of constitutionalism to ensure that the exercise of government powers is within legally defined parameters. This is important because it is within these parameters that human rights are protected.

There is no doubt that in technically specialist areas, the executive is the only branch that can regularly lay claim to expertise necessary to give effect to all the rights.[110] The same expertise may be called on by the legislature which, in most cases, considers draft legislation and policy that has gone through the executive and to which expertise has been applied. In addition, legislatures usually harness the expertise of their members by directing them to serve on portfolio committees that fall in their areas of technical expertise.[111] As a matter of fact, most legislative decisions take place in these committees after technical expertise has been applied. The same, or even a higher degree of specialisation, can be attributed to career administrators in the executive branch of the state.[112]

It is therefore important that, in designing remedies for the violation of rights, courts should not ignore the special expertise in the hands of the executive or legislative branches of government.[113] In spite of this, it is also important to note that, sometimes, though

109 See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 2 SA 374 (CC); *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA); and *New National Party v Government of the Republic of South Africa* 1999 3 SA 191.

110 See S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 22 and K Creamer 'The implications of socio-economic rights jurisprudence for government planning and budgeting: The case of children's socio-economic rights' (2004) 2 *Law, Democracy and Development* 222. See also Pieterse (n 78 above) 388. Pieterse is, however, quick to caution that the executive members are usually only indirectly accountable to the citizenry. In his opinion, this is especially so with the members of the bureaucracy who are only tenuously linked to the popular mandate. As a result of this, Pieterse contends that there is a need to develop mechanisms according to which the bureaucracy may be held accountable to the citizenry for its decisions that affect human rights; this can be done through the judiciary (388). See also Sachs (n 79 above) 140.

111 Horowitz (n 20 above) 28-29 contrasts the legislature with the courts and submits that the random assignment of cases to judges makes it hard for expertise to be harnessed and yet no member of the legislature will live in fear that an issue outside his sphere of competence will be thrust upon him or her (29-30).

112 See Horowitz (n 20 above) 30. He submits that, although the political appointees may not be as specialised as the career administrators, the difference between them and the judges is that they have information resources close at hand.

113 See Bilchitz (n 87 above) 132. It is submitted in ch six that the courts should strive as much as possible when they order structural interdict to harness the knowledge and skills that may be at the disposal of the parties, including the state. The initial response should therefore be to defer to the parties, especially the defendant, the responsibility of coming up with a remedial plan. In institutional cases, the defendant knows better how the administrative mechanisms of the institution function. This expertise should be exploited. See ch six sec 6.6.1.

the executive and legislature have at their disposal expertise and information, the solutions that they come up with may not be ones tested against real conflicts. The solutions may fail to address some problems that may not have been anticipated when, for instance, legislation was adopted.[114] It is when such problems arise that the courts' expertise kicks in. It is on this basis that it is submitted that in structural reform litigation, the circumstances compelling the courts to intervene do not arise from a desire to take action in conflict with affirmative legislative and executive programmes. Rather, the circumstances are created by the deficit brought about by legislative and executive inaction or neglect.[115] The legislature and executive could have come up with and stuck on solutions that in practice do not realise the rights protected.

In such a case, the courts may redirect policy, legislation or conduct in order to align them with the constitution and to solve real-life problems.[116] When the courts do this, they will not be intruding on the territory of either the legislature or the executive. Instead, the courts will be establishing a dialogue between themselves and the other branches in terms of which each branch is expected to contribute its special skills in solving the problem.[117] Additionally, there is nothing that stops the courts from availing themselves of technical expertise through expert evidence. The courts could

[114] See Scott & Macklem (n 9 above) 37. They submitted that petitions have the effect of drawing attention to personal circumstances that reveal failures and problems unknown to or avoided by those responsible for drafting legislation. According to Scott & Macklem, such failures and problems may not have been predicted by, or may remain hidden from the view of, legislators or bureaucrats who live a more privileged life than those claiming the benefit of constitutionally-entrenched social rights, and who are not institutionally required to listen to individual stories to produce a bridge between life experiences. In their opinion, this applies whether the body is the government, a legislative committee, or an international monitoring institution.

[115] T Eisenberg & S Yeazell 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* 465 495-496. Eisenberg and Yeazell submit that there is nothing that suggests that regulating public institutions is a task so clearly and exclusively allocated to the legislative and executive branches that judicial action is unwarranted even in the face of recalcitrance by other government actors. Horowitz (n 20 above) 24, however, submits that there is no institution that can do everything and that while this may be justification for intervention by the courts into policy matters, there is no guarantee that the judiciary's action will proceed from proper diagnosis or that it will not be deflected in the course of executing the functions.

[116] S Sturm 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* 1355 1387-1388.

[117] M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284 295 307.

summon witnesses to testify whenever technical questions arise in the course of the proceedings.[118]

It is also important to note that, although the courts may not have access to as many sources of information as other organs do, the litigation process allows for distilled presentation of information in the form of evidence. Sometimes the adversarial nature of litigation compels parties to search and bring before the courts all information relevant to the dispute.[119] The courts' problem-solving procedures also offer a number of advantages not found in the processes of other organs. Within the judicial processes, interested parties are given an opportunity to make submissions in accordance with a settled procedure and the courts are under a duty to give reasoned judgments. Indeed, a court provides a forum for relating debates over fundamental values to individual concrete cases: '[I]t is an opportunity to have personal narratives heard and rights put in living context in a way that is virtually impossible for modern legislatures.'[120]

Additionally, the court processes provide for avenues of reviewing decisions if they are contested. This is through procedures that guarantee parties rights of appeal and review. The political processes may not have the advantage of revisiting decisions as of right. Mistakes and oversights may therefore go unnoticed, and when noticed, remedial measures may require involvement in protracted and inaccessible political processes.

The judiciary is also always keen to tap into outside energies and resources in search of appropriate remedies that vindicate the rights. As is seen in chapter six,[121] the courts have particularly been most effective in this endeavour through the use of structural remedies that take the courts outside the traditional constraints of adjudication.[122] The courts have successfully used court-appointed experts, commissions of inquiry, public hearings and negotiation committees to find solutions to structural problems.[123]

In spite of some technical deficiencies, therefore, the courts have a number of advantages that enhance their capacity to adjudicate

118 Horowitz (n 20 above) 24-25 48 has, however, warned that it has always proved difficult to integrate specialists into the adjudicative process; specialised information is usually provided to judges through the medium of expert witnesses and consultants or through popularised written versions of the information. In his opinion, the expert witnesses are paid by the respective parties and they are almost invariably partisan.

119 Chayes (n 92 above) 1308.

120 Scott & Macklem (n 9 above) 38.

121 Sec 6.3.

122 Chayes (n 92 above) 1309.

123 Ch six sec 6.3.

socio-economic rights. It is important that the judicial function should be assessed not in terms of its weaknesses, but in terms of its strengths. It is also important to note that, when courts adjudicate socio-economic rights, they are not doing so in competition with the other organs of state. Rather, they are engaging in a dialogue which requires that all the institutions of the state play a role in the constitutional enterprise of actualising the rights. In such a dialogue, it is important that all institutions put to use, in a collaborative manner, their skills and capabilities as regards the enforcement of the rights. The power of the courts to give the last word on the meaning of the Constitution cannot therefore be exercised effectively without the co-operation of other branches of the state.[124]

The courts may not have the technical expertise to decide socio-economic questions from a political perspective. They do, however, know about human dignity and oppression. The courts know 'about things that reduce a human being to a status below that which a democratic society would regard as intolerable'.[125] The judiciary should, however, where necessary, rely on other organs of the state for technical capacity which those organs should provide in good faith with the intention of advancing the rights in the constitution. Such collaborative problem-solving processes also have the potential of making it much easier to respond to polycentric tasks.

2.3.3 The problem of polycentricity

Arising from the objection as based on technical competence is also the assertion that socio-economic rights disputes have polycentric repercussions which makes them unfit for judicial adjudication. This objection garners backing from the writings of Fuller,[126] who sets out to answer two broad questions. Indeed, it is from Fuller's writings that a definition of the term 'polycentricity' could be deduced. The first question Fuller sets out to answer is as to what kinds of social tasks can properly be assigned to courts and other adjudicative agencies.[127] The second question is what the forms of adjudication

[124] I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 158.
[125] Sachs (n 79 above) 140.
[126] L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353.
[127] Fuller (n 126 above) 354. Specifically, he asks the question as to what the lines of division that separate social tasks from those that require an exercise of executive power are. Additionally, he asks what assumptions underlie the conviction that certain problems are inherently unsuited for adjudicative disposition and should be left to the legislature.

are and whether such forms can be deviated from.[128] Before answering these questions, Fuller begins by defining adjudication.

In Fuller's opinion, adjudication means more than the settling of disputes or controversies. Instead, 'adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated'.[129] Fuller submits that what distinguishes adjudication from other forms of decision-making processes is the form of participation allowed the parties. He views adjudication as guaranteeing the parties a right to formal and institutional participation in the decision-making process. This is because the parties are assured the right of audience to present proofs and reasoned arguments.[130] While Fuller acknowledges the fact that other forms of decision-making processes may also allow for such participation, this is not guaranteed as a right. The decision maker is not obliged to listen to the parties and may ignore their arguments whether or not they are reasoned.[131] On the other hand, the adjudicator is obliged to listen to the proofs and reasoned arguments of the parties and to take them into account in making his or her decisions. The duty to consider the arguments of the parties places a demand of rationality on the adjudicator, which is not expected of other decision makers.[132]

The absence of meaningful participation due to impossibility, in Fuller's opinion, may place some tasks beyond the limits of adjudication. He cites polycentric tasks as an example of tasks in which meaningful participation may be impossible.[133] A polycentric matter is one in respect of which a decision would have unforeseen and wide repercussions affecting a multitude of parties, sometimes not before the court. Fuller contends that the range of people affected by a decision of a court may not be easily seen. As a result,

128 Fuller (n 126 above) 354. Specifically, he asks and answers questions such as what would be the use and dangers of deviating from the ordinary forms of adjudication; whether there are permissible variations beyond which one would speak of abuse or perversion.

129 Fuller (n 126 above) 357 380. According to Fuller, even in the absence of formalised doctrines such as *res judicata* or *stare decisis*, an adjudicative determination will always enter in some degree into the litigant's future relations and into the relations of other parties who see themselves as possible litigants before the same tribunal. Such parties will conduct themselves in a way that avoids such litigation. This is the nature of the social ordering influence that adjudication gives rise to (357).

130 Fuller (n 126 above) 365.

131 Fuller (n 126 above) 366. Fuller gives the example of a political speech during an election. There is no affirmative right that the campaigner will have the opportunity to give a reasoned speech, and even when this right is guaranteed, there is no formal assurance that anyone will listen to the speech, let alone act on its reasoned arguments. In Fuller's opinion, a party in the process of bargaining the terms of a contract is in no better position.

132 Fuller (n 126 above) 366-367.

133 Fuller (n 126 above) 364.

the participation of such people with diverse interests cannot be organised. The adjudicator is inadequately informed and cannot determine the repercussions of the proposed solution.[134] The courts, unlike administrative authorities, may not have in their possession large amounts of information to guide their decisions.[135] The courts, either due to the limited resources of the parties or as a result of their own rules, may be limited to the information provided in evidence.[136] Such evidence may not adequately reflect the many competing interests implicated by the case. Consequently, many complex policy issues remain unaddressed by the court, resulting in unexpected repercussions making the decision unworkable. In Fuller's opinion, the unworkable decision is either ignored, withdrawn or modified, sometimes repeatedly, making it hard to enforce and observe.[137]

In the *TAC* case, the Constitutional Court indicated that it was alive to the problem of polycentric interests implicated by socio-economic rights litigation. It held that courts were ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.[138] As can be deduced from the discussion in chapter three,[139] polycentricism and the institutional capacity of the courts is one of the factors that influenced the Constitutional Court's reluctance to define a minimum core for the right of access to adequate housing.[140] In the *Grootboom* case, the Court said that determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions because the needs are diverse: There are those who need land; others need both land and houses; yet others need financial assistance. According to the Court, it is not possible to determine the minimum threshold without first identifying the needs and opportunities for the enjoyment of such a right. The Court said

134 Fuller (n 126 above) 395. He gives the example of the tasks of players in a football team. Each shift of position by one player has a different repercussion for the other players. He also compares polycentric tasks to a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will not simply double each of the resulting tensions, but will rather create a complicated pattern of tensions. He describes this as a polycentric situation because it is many-centred with each crossing of strands being a distinct centre for distributing tensions (394).

135 Abramovich (n 35 above) 183.

136 Pieterse (n 78 above) 393. According to Pieterse, one of the reasons why all affected parties cannot be made party to the litigation is because of inadequacies in logistics. This could mean not only logistics available to the parties, but also the resources placed at the disposal of the court for that purpose. See also P Lenta 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 545.

137 Fuller (n 126 above) 401.

138 Para 38.

139 Ch three sec 3.2.

140 See also Steinberg (n 75 above) 271. He submits that the definition of a minimum core by the Constitutional Court would have amounted to involvement in a utilitarian calculus of social and economic advantage of a decision in a context of a myriad of competing claims which are not before the Court.

that these will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. The Court said that, unlike the ESCR Committee, it did not have access to the information that would enable it to define the minimum core.[141]

It is necessary for courts enforcing socio-economic rights to confront the problem of polycentricism. Appreciation of the extent of the polycentric nature of a socio-economic rights case will be a factor to consider when designing an 'appropriate just and equitable relief'. This is important because '[t]he harm caused by violating constitutional rights is not merely a harm to an individual applicant, but a harm to society as a whole'.[142] Constitutional litigation against the state in most cases arises from violations of a structural nature implicating a number of interests. Addressing such structural violations calls for significant structural and institutional changes not only involving, but also affecting persons other than the parties.[143] As a result of this, the appropriateness of a remedy will be affected unless the court considers all the interests implicated by a case.

Socio-economic rights cases are believed to be polycentric in nature, firstly, because of the conception that they have budgetary consequences.[144] It is submitted that each decision to allocate a particular sum of money for a specified purpose implies less money for other purposes.[145] According to Davis, a case involving a person's right to a house would not only impact on that person and the state, but also on interests of other citizens. The interests of other citizens would raise questions such as whether the money should be used to build a crèche, a hospital or sporting stadium.[146]

141 Paras 32-33.
142 Currie & De Waal (n 95 above) 196.
143 Sturm (n 116 above) 1364. Fiss gives the example of a structural order to reform the practices of a police department as having an effect upon all the individual police officers, present and future. O Fiss 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1 49.
144 Budgets, it is believed, are finite in nature and have a multitude of ways in which to be distributed. See Pieterse (n 78 above) 393.
145 K O'Regan 'Introducing socio-economic rights' (1999) 1 *ESR Review* 2. Currie & De Waal (n 95 above) 570 give *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) (*Soobramoney* case) as an example of a polycentric case. According to Currie and De Waal, if the Constitutional Court had decided that Soobramoney was entitled to dialysis treatment, the decision would not only have affected the individual, but also the complex web of mutually interacting resource allocations.
146 Davis (n 72 above) 478.

Secondly, it is submitted that socio-economic rights are logically linked to collective rather than individual claims. Yet the courts are ill-suited to adjudicate collective claims because they give rise to a multiplicity of interests.[147] However, this submission may be challenged on the ground that the problem of polycentricism is alive in all forms of constitutional litigation. As conceded by Fuller, all disputes that come before the courts have either explicit or concealed polycentric effects.[148] This is not limited to socio-economic rights, but extends to civil and political rights as well.[149] It is true that a petitioner in a constitutional case, whether involving civil and political rights or socio-economic rights, may be motivated by personal or private interest. In spite of this, the decision of the court usually has a wide impact and may affect so many people.[150]

Examples of civil and political rights disputes will make this clearer. Consider a case in which the issue is the extent to which an attorney's right to privacy may be limited. The case will have repercussions not only for the particular attorney and his clients, but for hundreds, or even thousands, of other attorneys and their clients. This is because the case may establish a precedent that binds future disputes. Another example is a case involving the freedom of association or trade union rights; such a case may have multiple repercussions for parties other than the litigating union and specific employer. The decision will have implications for all members of the particular union, members of other unions and employers in the same

147 See F Viljoen'The justiciability of socio-economic and cultural rights: Experience and problems' (unpublished paper on file with author) 40. Eg, consider a case in which a court orders that the government provides medical treatment to an applicant because he or she cannot afford it. This case would have an impact on many other patients not before the court, but who could also qualify for the treatment because they cannot afford it. However, the medical needs of patients are different. Some may not afford primary care necessary for their needs while others, though economically well placed, may not afford tertiary medical care such as kidney or heart transplants. See D Bilchitz 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* 2.

148 Fuller (n 126 above) 401. However, he adds that what is required by the adjudicator is to know when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached. Fuller submits that socio-economic rights take the courts to such limit, which requires them to abstain from adjudicating such rights. But this view has been contradicted by Sturm (n 116 above) 1355-1446. According to Sturm, Fuller's view of the limits of adjudication renders illegitimate much of what the courts do today. This is because courts are already involved in adjudicating polycentric tasks. Sturm also criticises Fuller's ideas on the ground that his theories are based on traditional private law litigation, whereas new forms of litigation have emerged, such as public law litigation on which human rights litigation is based (1387-1388).

149 O'Regan (n 145 above) 2.

150 Cassels (n 80 above) 302. Cassels also submits that constitutional litigation is not simply a bipolar contest between private interests; instead, it represents itself as a battle for the very meaning of public interest and has the character of a class action (304). See also generally Chayes (n 92 above).

or similar industries. The same could be said of an order in a criminal trial, which may also force the prosecuting authorities to employ and pay more investigators, thus requiring budgetary adjustments with multiple repercussions. However, simply because the multitudes of affected persons are not in court will not stop adjudication of the dispute. The mere fact that a court cannot deal with many or all of the aspects of a case does not mean that it deals with none.[151]

Furthermore, it is submitted that policy formulation and legislative processes are not immune from polycentric repercussions.[152] In the first place, one cannot assert, too strongly, that the legislative or executive processes are representative of all the interests particularly on issues of policy formulation and implementation.[153] Those who are not politically organised, and in most cases the impoverished, may find it hard to make their voices heard in the political processes. In addition, usually legislation and policy are designed and adopted in the abstract, and implemented without first having been tested on practical problems. The courts, on the other hand, stand in an advantageous position. While their decisions may have polycentric repercussions, they deal with real problems, sometimes not even contemplated either by the policy makers or by the legislators.[154] Such cases before the courts will alert the authorities to the widespread nature of socio-economic problems which may either have been ignored or not contemplated.[155]

The *Grootboom* case is a good example of a case alerting the authorities to the widespread nature of the problem of accessing adequate housing by many desperate people. The Constitutional Court indicated that it was aware of the intolerable conditions under which many people are still living and that the respondents were but a fraction of them.[156] The declaration of the Court that the government's housing programme was unreasonable has since

151 Pieterse (n 78 above) 394. See also A Epstein 'Judicial review: Beckoning on two kinds of error' (1985) 4 *Cato Journal* 716. Epstein uses the analogy of an auditor - simply because an auditor cannot correct every abuse in a department's procurement policies does not mean that he should not go after a $5 000 coffee pot. See also C Scott & P Alston 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 206 242.

152 According to Fiss (n 143 above) 43, virtually all public norm creation is polycentric because it affects as many people as structural reform litigation and equally impairs the capacity of each affected individual to participate. Fiss contends further that more often than not, there is a myriad of possible remedies that could be formulated.

153 Chayes (n 92 above) 1311.

154 R Pound *The formative era of American law* (1939) 45, as quoted by Horowitz (n 20 above) 3. See also Pieterse (n 78 above) 395.

155 Abramovich (n 35 above) 195. See also Viljoen (n 147 above) 41.

156 Para 2.

inspired litigation and policy revision in the area of housing rights.[157] The Constitutional Court's ruling that the government's housing policy was unreasonable for failure to provide for the needs of those in desperate need prompted government to, for instance, adopt an emergency housing policy.[158] When such policies are adopted, they will have wide application and benefit all people in situations similar to that of the litigant(s). This, as will be seen in chapter four, is the essence of the notion of distributive justice which is presented as the best response to polycentric tasks in the enforcement of socio-economic rights.[159]

Fuller's theory is also deficient to the extent that it does not develop a remedial theory. Fuller does not extend his analysis to the determination of the kinds of remedies that may be suitable in what he considers proper forms of adjudication. This omission is, however, deliberate; it naturally arises from the relationship that Fuller and other theorists like him assign to rights and remedies. As is demonstrated in chapter four,[160] a sizeable number of scholars believe that rights and remedies are closely related.[161] This is because the latter are deduced from the former. In this relationship, since the remedy comes logically from the right, there is no need to develop an independent remedial theory. The purpose of the remedy is one of addressing the right that has been violated.

It is demonstrated in chapter four that this theory uses the notion of corrective justice as its basis. The corrective justice theory emphasises the fact that remedies are granted against a defendant

157 See *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others* 2005 8 BCLR 786 (CC); *Port Elizabeth Municipality v Various Occupiers Case* 2005 1 SA 217 (CC).; *City of Cape Town v Neville Rudolph and Others* 2003 11 BCLR 1236 (C); *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2003] 3 All SA 690 (C); and *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006 6 BCLR 728 (W).

158 National Department of Housing, Part 3: National Housing Programme: Housing Assistance in Emergency Circumstances April 2004; sourced at http://www.housing.gov.za/Content/ legislation_policies/ _Emergency%20%20Housing%20Policy.pdf (accessed 29 November 2005). The policy acknowledges the fact that it has been adopted as a direct response to the Constitutional Court's ruling that the existing programme was unreasonable (see 5). See also Centre for Study of Social Policy (CSSP)'s report, New roles for old adversaries: The challenge of using litigation to achieve system reform (January 1998), available at http://www.cssp.org/uploadFiles/New_for-old_adversaries.pdf> (accessed 30 November 2005). This report notes that a judicial decree can spotlight the worst abuses and galvanise public attention, thereby producing short-term gains in funding for more services. The report contends further that class action litigation can serve to spark and sustain real institutional change in deeply troubled jurisdictions. It can force agencies to acknowledge the magnitude of the problem and pay attention to resolving it (3).

159 Sec 4.2.2.

160 Sec 4.3.

161 See P Gewirtz 'Remedies and resistance' (1983) 92 *Yale Law Journal* 585; Cooper-Stephenson (n 20 above) 6; Cassels (n 80 above) 288; and D Levinson 'Rights essentialism and remedial equilibration' (1999) 99 *Columbia Law Review* 857.

only when liability for violation of a right has been found.[162] While this may be the case in private law litigation, it is not true in public law litigation which implicates interests not necessarily connected to a defendant's wrong. Such litigation also exposes systemic problems not necessarily linked to the wrong but which need to be addressed. Rather than restrict oneself to the interests of the parties and the establishment of liability, structural litigation confronts exterior interests and is geared more towards problem solving rather than fault finding. To achieve this, the development of a remedial theory that is not dictated by the rights itself becomes necessary.[163] However, the theoretical considerations that affect both rights and remedies must be kept separate.[164] This again is where distributive justice becomes most relevant. This is something that Fuller overlooks; he ignores the fact that in order to consider third party interests implicated by a case, the court may separate the rights from the remedy. This will enable the court to consider third party interests without being unnecessarily constrained by the impact which this would have on the right.

Fuller's theory of polycentricism was therefore conceived with reference to private law litigation and is based on the notion of corrective justice. The notion of corrective justice, as discussed in chapter four,[165] makes a suit individualistic, bipolar in nature and involving very limited interests. Fuller's objection to polycentric litigation has no place in modern public law litigation. This form of litigation has become very complex and often involves a number of interests meriting legal protection. Under a legal duty to protect human rights, modern courts have therefore resorted to distributive justice methods of litigation that deviate substantially from the traditional forms.[166]

As seen above, Fuller's main concern with public law litigation is that it does not guarantee participation by all the interests concerned. However, Fuller fails to explore ways to bring on board the participation, as much as is reasonably possible, of all those affected by a case.[167] Yet in constitutional litigation, a court may confront polycentric challenges by involving a wide range of parties in the resolution of a dispute.[168] In fact, at the disposal of the courts are several procedures that allow judges to invite participation by all

[162] See ch five sec 5.2.1.
[163] Sturm (n 116 above) 1390. See also R Zakrzewski *Remedies reclassified* (2005) 37.
[164] Wells & Eaton (n 51 above) xvii.
[165] Sec 4.2.1.
[166] See Sturm (n 116 above) 1387-1388. Sturm contends that the social realities are that our social existence is now defined by large-scale organisations, particularly government bureaucracies, and that to insist on adjudicative methods that ignore these realities is a mistake.
[167] Sturm (n 116 above) 1391.
[168] See Fiss (n 143 above) 40.

persons affected by a case. A judge could order the issuance of third party notices to people he or she thinks may be affected by a decision. In addition to this, the judge may appoint a guardian *ad litem* to represent absentee interests.[169] In modern constitutional states, constitutional litigation is often complemented by provisions widening *locus standi*, which opens up the process of litigation to a greater number of interested parties. This is the spirit of section 38 of the South African Constitution,[170] which widens *locus* beyond the confines of the common law.[171] The Constitutional Court has embraced the spirit of this section fully by allowing access to the courts to a variety of people who in traditional terms would not have had audience.[172]

Indeed, the courts have used section 38 to entrench the use of class actions to pursue claims based on the Constitution. In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape,*[173] the applicants' disability grants had been suspended without due process of law. They brought an action on their own behalf and on behalf of others in a similar position that numbered over 100 000. Relying on section 38, the Court rejected the objection that the applicants did not have standing. The Court said that the practical difficulties associated with representative and class actions could not justify denial of such action when the Constitution made specific provision for it. According to the Court, a flexible and generous approach was called for to make it easier for disadvantaged and poor people to approach the courts on public issues and to ensure that the public administration adhered to the fundamental constitutional principle of legality in the exercise of public power. This decision was confirmed by the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others.*[174]

Additionally, the Rules of the Constitutional Court allow any person who is entitled to join the proceedings to apply for leave to

169 Chayes (n 92 above) 1312.

170 Sec 38 allows the following people to approach the courts in constitutional matters: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.

171 The common law is very strict on the question of who may approach the court to enforce a right. It is only those with a direct interest in the case or deriving interest from the parties that may be joined in litigation.

172 Chaskalson J in *Ferreira v Levin NO* 1996 1 SA 984 (CC) para 165 held that the Court should rather adopt a broader approach to standing. This would be consistent with the mandate given to the Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.

173 2001 2 SA 609 (E).

174 2001 10 BCLR 1039 (A).

intervene at any stage of the proceedings.[175] The Rules also allow for the participation as *amici curiae* 'any person interested in any matter before the Court'.[176] The involvement of a number of parties in the litigation will bring into perspective interests which the main parties have not considered. This will put the Court in a position to make decisions that do not adversely affect such other interests. This does not, however, mean that all interests will be brought to light;[177] rather it plays a very important minimising role and may provoke inquiry into the impact of the decision on interests not directly implicated.

2.4 Conclusion

Though this chapter grounds the objections to socio-economic rights on legal notions, in South Africa these objections have also had political dimensions. The divergence has been between those that advocate for limited state powers; this would only call for state non-interference. Those who support this philosophy discouraged the inclusion of socio-economic rights in the South African Constitution. On the other hand, those who believed in the philosophy of extensive state power saw great relevance of socio-economic rights.[178] However, contemporary problems and needs have led to a redefinition of the role of the modern state. New social and economic demands and the interaction of the people and the state in this sphere call for a more active state.[179] This is only made effective if the state is placed under a justiciable and legal obligation to do so through recognition of socio-economic rights. Excluding socio-economic rights from the Constitution would exclude the interests they protect from

175 Rules of the Constitutional Court, promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003 (Rules of Court) rule 8(1).

176 Rules of Court (n 175 above) rule 10. This rule has been used mainly by public interest groups, human rights advocates and academic research institutions in order to promote the interests of marginalised groups and to suggest interpretations of the human rights provisions in the Constitution. Examples of such groups in socio-economic rights litigation include the Legal Resource Centre, the Treatment Action Campaign and the Community Law Centre at the University of the Western Cape. For a discussion of the impact of such interventions, see M Heywood 'Shaping, making and breaking the law in the campaign for National HIV/AIDS treatment plan' in Peris & Kristian (n 79 above) 181.

177 Though the judge must be certain that the full range of interests is represented, he or she should not fail in his or her duty to protect a right simply because every affected individual cannot meaningfully be represented. See Fiss (n 143 above) 40.

178 De Villiers (n 14 above) 599. The National Party was bent towards avoiding an activist and interventionist state.

179 De Villiers (n 14 above) 599. Cappelletti argued that to exclude social rights from a bill of rights would be to stop history at the time of *laissez faire* and to forget that the modern state has greatly enlarged its reach and responsibilities into the economy and the welfare of people. M Capelletti 'The future of legal education. A comparative perspective' (1992) 8 *South African Journal on Human Rights* 10.

the process of social, economic, and political interchange and will foreclose the forums for redressing socio-economic injustices.[180]

Socio-economic rights are capable of judicial enforcement. In many respects, they are similar to civil and political rights. Civil and political rights, like socio-economic rights, engender positive obligations in addition to negative obligations. Additionally, civil and political rights have resource implications. It is therefore not proper for one to argue that socio-economic rights are not justiciable because they are resource dependent. Socio-economic rights cannot also be discredited on the ground of their vagueness. Many elements of civil and political rights remain vague though they have benefited from so many years of judicial enforcement.

This chapter has also demonstrated that the judiciary is empowered through the doctrines of constitutionalism and the rule of law to check the power excesses of the legislature and the executive.[181] This is in addition to protecting the rights of all, including those of minorities.[182] The doctrine of constitutionalism as complemented by the principle of the rule of law from this perspective also helps in understanding the notion of democracy. The objectors have skewed democracy to mean only majoritarian democracy. However, this chapter has demonstrated that democracy means more than majoritarian democracy; it embraces the protection of the values and interests of minorities.[183] It is incumbent upon the judiciary to protect these interests against majoritarian infraction.

[180] Scott & Macklem (n 9 above) 28. Scott and Macklem argue that in the absence of entrenched social rights, it would be unwise to expect that values left unconstitutionalised could hold their own in wider political discourse. That such rights will be marginalised and categorised as second-class arguments and those most dependent on them for basic survival and for integration into society at large will become or remain second-class citizens (36).

[181] Currie & De Waal (2001) (n 95 above) 10. See also Currie & De Waal (2005) (n 95 above) 8; Hamilton (n 85 above) 467; and *TAC* case paras 98-99.

[182] Forsyth & Elliot (n 68 above) 294. See also Moseneke (n 74 above) 315.

[183] See Devenish (n 83 above) 4. See also E Whittington 'An "indispensable feature"? Constitutionalism and judicial review' (2002) 6 *Legislation and Public Policy* 24-26; and Davis *et al* (n 86 above) 2.

CHAPTER 3 TRANSLATING SOCIO-ECONOMIC RIGHTS FROM ABSTRACT PAPER RIGHTS TO FULLY-FLEDGED INDIVIDUAL RIGHTS: THE SOUTH AFRICAN JURISPRUDENCE

3.1 Introduction

This chapter explores the nature of the obligations engendered by the different categories of socio-economic rights protected by the 1996 Constitution of South Africa (Constitution) and the extent to which they have been implemented. This discussion is a prerequisite to understanding the nature of the remedies that a violation of socio-economic rights should attract. One cannot determine the most appropriate remedy to vindicate a right, which is the secondary theory, without an understanding of the nature of the obligations the right engenders, which is the primary theory.[1] The only reason remedies exist is to give effect to the rights that are protected by the law. Actually, in procedural terms, the remedial process begins only after a finding of liability has been made.[2]

There is ample evidence to suggest that the drafters of the Constitution were greatly inspired by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which explains why most socio-economic rights provisions are drafted along the same lines as those of ICESCR.[3] Article 2(1), the linchpin of ICESCR, obligates states to undertake steps to the maximum of their resources, with a view to progressively realising the rights by all

1 Dinah Shelton refers to rights and remedies as two theories, the primary and secondary respectively. The primary theory addresses the obligations engendered by the rights and the secondary theory addresses the question of what ought to be done when the rights are violated. Both theories have to be addressed in the litigation process. D Shelton *Remedies in international human rights law* (1999) 37. See also K Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in J Berryman (ed) *Remedies, issues and perspectives* (1991) 1 Cooper-Stephenson contends that rights and remedies are inextricably linked, that determination neither of right nor remedy can be made in isolation of the other (6).

2 P Sturm 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* 1360.

3 See Constitutional Assembly Constitutional Committee, Draft Bill of Rights, Volume 1, Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly (9 October 1995) (on file with author).

appropriate means. Similarly, the Constitution compels the state to take reasonable legislative and other measures, within its available resources, to progressively realise the rights.[4] The differences between the Constitution and ICESCR are at best nomenclatural; a closer scrutiny shows that the obligations engendered by the two instruments are similar in many respects. Both are subject to limitations defined by the available resources and the need to realise the rights progressively. 'By all appropriate means', as used in ICESCR, could be equated to 'reasonable legislative and other measures' as used in the Constitution.[5] In spite of the similarities, the Constitutional Court has endorsed some and rejected other of the international law constructions of ICESCR.

While South Africa has signed, but not yet ratified, ICESCR, this does not appear to be the reason why the Constitutional Court has rejected some aspects of the jurisprudence generated by this Covenant.[6] Instead, the rejection is informed by the Court's normative conception of the nature of the obligations that socio-economic rights engender.[7] This is in addition to the Court's understanding of its role in enforcing the Bill of Rights against the

4 Secs 26(2) & 27(2). The right to further education in sec 29(1)(b) is also to be realised progressively by the state taking reasonable measures, but no mention is made of acting within available resources.

5 The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has said that, while countries are free to choose what they consider to be the most appropriate means, it is important that the basis of such means be given. In spite of this, the ESCR Committee has said that the ultimate determination as to whether all appropriate measures have been taken remains one for the ESCR Committee itself to make. General Comment No 3, *The nature of States Parties' obligations* (fifth session, 1990), UN Doc E/1991/23, annex III 86 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 14 (2003), para 10. There is no doubt that an element of the reasonableness of the measures chosen will feature in the determination of appropriateness.

6 In fact, the South African courts are compelled by the Constitution to consider international law when interpreting any legislation and to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law (secs 39(1) and 233). Indeed, the Constitutional Court has held that both binding and non-binding international law may be used as a tool of interpretation of the Constitution. See *S v Makwanyane* 1995 3 SA 391 (CC) (*Makwanyane* case) para 35. This means that, although South Africa has not ratified ICESCR, the Covenant may still be used as a tool for interpreting the socio-economic rights provisions in the Constitution. It should be noted, however, that South Africa, in support of its membership to the Human Rights Council, has pledged to ratify ICESCR. See Note No 143/06 made by South Africa to the President of the UN General Assembly 2 May 2006, annexed to the document, detailing the list of candidates for election to the Human Rights Council, UN General Assembly 60th session: Election and Appointments. Subsidiary Organs and other elections, available at http://www.un.org/ga/60/elect/hrc/.

7 M Pieterse 'A benefit-focused analysis of constitutional health rights' unpublished PhD thesis, University of Witwatersrand, 2005 121.

elected branches of the state.[8] The Constitutional Court has been caught between the need to translate the paper rights into tangible rights, on the one hand and, on the other hand, the need to maintain the separation of powers by deferring to the legislative and executive branches of government.[9]

Pieterse submits further that the Court simultaneously affirms its institutional competence to award relief for violations of socio-economic rights and declines to exercise this competence where such exercise requires it to depart from adjudicative practices to which courts are accustomed: 'It simultaneously proclaims the interdependence and indivisibility of human rights and refuses to translate such proclamation into tangible permeation of norms associated with the vindication of social and civil rights respectively.' In his opinion, this is because the Court's jurisprudence is but in its infancy and it is therefore perhaps wise for it to approach the relatively novel task of reviewing state compliance with socio-economic duties with tentative pragmatism.[10] According to Davis, the Constitutional Court is well aware of international jurisprudence and its ambitious reach, but is reluctant to cross the judicial boundary which it has established for itself by employing an administrative law model to justify its cautious approach.[11] This is why it has rejected international human rights law interpretations that would put it in direct confrontation with the other branches of the state.

Roux submits, for instance, that the adoption of the minimum core approach would have brought the Constitutional Court into direct confrontation with the political branches since it would have required the Court to substitute its own views of the needs that ought to be prioritised for that of the legislature and executive. This is why the Court has used South Africa's non-ratification of the ICESCR,

8 M Pieterse 'Possibilities and pitfalls in the domestic enforcement of socio-economic rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882 903.

9 Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 316 submits that the court's approach does not reflect ignorance of international jurisprudence nor a lack of cognisance of the implications of sec 26(1) (the right of access to adequate housing) and sec 27(1) (the right of access to health care services, sufficient food and water, and social security and social assistance) of the text, but rather the knowledge that the text itself holds out a promise of a kind of society predicated on a very different approach from that which currently prevails in the Ministry of Finance. Davis contends that the government has retreated from its Reconstruction and Development Policy (RDP) promises, which emphasised a more interventionist state, to the Growth and Redistribution Policy (GEAR), which promotes a minimalist state intervention role.

10 As above.

11 Davis (n 9 above) 304.

which he refers to as a 'discretionary gap', to avoid interpretations that would lead to confrontation.[12]

Some scholars have described the Constitutional Court's approach as 'minimalist' in the sense that it only decides what is necessary in a particular case and avoids laying down any abstract rules and theories. This approach is considered ideal in protecting democracy, because it leaves contentious issues open for democratic deliberation.[13] The Court's approach is therefore perceived as capable of both respecting the separation of powers and realising the transformative vision of the Constitution.[14] Indeed, the Constitutional Court's confirmation that socio-economic rights are justiciable and the development of its reasonableness review approach as a means of assessing the state's obligations has strengthened the position of the advocates of socio-economic rights in both domestic and international arenas. This approach not only has confirmed that socio-economic rights are capable of constitutional protection, but also that they are amenable to judicial enforcement.[15]

In spite of this, the Court has been criticised for construing socio-economic rights as abstract rights, whose beneficiaries are only entitled to reasonable programmes instead of concrete goods and services. The Court not only has failed to give content to these rights, but has also failed to interrogate the effectiveness of the means chosen to realise them. This is in addition to the failure to interrogate the reasonableness of the resources deployed for the purpose of realising the rights and to question whether there are efforts to raise and allocate more resources to the rights.

This chapter demonstrates, however, that the reasonableness review approach could be strengthened to give normative content to the rights. A proportionality test, equivalent to the one used in the general limitations clause inquiry, is proposed. This would enable the Court to interrogate the reasonableness of the means chosen on the basis of their ability to realise the right(s) in issue. The chapter also advocates interrogation of the reasonableness of the resources allocated to the realisation of the rights. The burden should be cast

12 T Roux 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92 96. See also D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 33 51.

13 C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264 269, quoting from C Sunstein *One case at a time: Judicial minimalism on the Supreme Court* (1999) 9.

14 Steinberg (n 13 above) 276.

15 See *In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) (*First Certification* case).

on the state to prove that it has allocated reasonable resources to the rights. In case of resource limitations, the state should prove its plans of improving on the resources in addition to proving that it is employing the available resources maximally.

3.2 An appraisal of the Constitutional Court's reasonableness review approach

The Constitutional Court has held that in socio-economic rights litigation, the question should not always be one of whether or not these rights are justiciable but how to enforce them in a given case.[16] The Court has dismissed submissions that socio-economic rights cannot be justiciable because they have budgetary implications. In the Court's opinion, when the courts enforce socio-economic rights, the task conferred upon them is no different from the one conferred on them when they enforce civil and political rights. According to the Court, this is because, just like socio-economic rights, orders to enforce civil and political rights may have budgetary implications.[17] The Court has also held that the inclusion of socio-economic rights in the Constitution does not result in the violation of the doctrine of separation of powers and that, at the very minimum, socio-economic rights can be negatively protected from improper invasion.[18]

On the basis of the above, the Constitutional Court has had no problem enforcing the socio-economic rights in the Constitution. The first case to engage directly with the enforcement of these rights was *Soobramoney v Minister of Health, KwaZulu-Natal*.[19] This case was instituted by a patient who had been denied access to dialysis treatment under a policy that excluded patients of his status because of the limited resources at the disposal of the hospital.[20] The Court found that, while the state was under a duty to provide Mr Soobramoney with access to health care services, it had been established that the state did not have sufficient resources to provide

16 *Government of the Republic of South Africa v Grootboom & Others* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) (*Grootboom* case) para 20.
17 *First Certification* case (n 15 above) para 77.
18 *First Certification* case (n 15 above) para 78.
19 1998 1 SA 765 (CC); 1997 12 BCLR 1696 (CC) (*Soobramoney* case).
20 Mr Soobramoney relied on the sec 27(3) right not to be denied emergency medical care and the sec 11 right to life. The Court found that Mr. Soobramoney could not base his case on sec 27(3) because his case was not an emergency. In the Constitutionall Court's opinion, an emergency occurs when '[a] person suffers a sudden catastrophe which calls for immediate medical attention' (para 20). Mr Soobramoney's case was not an emergency; it was 'an ongoing state of affairs resulting from a deterioration of '[his] renal function which is incurable' (para 21). Having failed to be treated as an emergency under sec 27(3), Mr Soobramoney's case could be dealt with only in terms of sec 27(1) and (2) of the Constitution.

dialysis treatment to all those in need.[21] The Court emphasised that the guarantees of the Constitution are not absolute but may be limited in one way or another. According to the Court, in some instances, the Constitution states in so many words that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The Court adds that in its language, the Constitution accepts that it cannot solve all of our society's woes overnight, but must go on trying to resolve these problems. However, according to the Court, one of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources.[22]

In the Court's view, it would only interfere with the decision of the hospital if it was irrational and taken in bad faith: 'A court will be slow to interfere with *rational decisions taken in good faith* by the political organs and medical authorities whose responsibility it is to deal with such matters.'[23] The Court added that, unlike the political organs, it did not have the institutional capacity to engage with the agonising problems of making choices.[24]

The *Soobramoney* case was followed by the *Grootboom* case, a case in which the Court moved away from the rationality test set out in *Soobramoney* to a reasonableness test. This case was instituted under sections 26(1) and 28(1)(c) of the Constitution to enforce everyone's right of access to adequate housing and the children's rights to shelter, basic nutrition and health care respectively. In setting aside the decision of the Cape High Court,[25] the Constitutional Court held that the Constitution required the state to put in place a comprehensive and workable plan in order to meet its socio-economic rights obligations. The Court defined this obligation as constituting three key elements that have to be considered separately: (a) 'to take reasonable legislative and other measures'; (b) 'to achieve the progressive realisation' of the right; and (c) to act 'within available

21 See paras 24-26.
22 Para 43.
23 Para 29 (my emphasis).
24 Para 58.
25 See *Grootboom v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C) in which Davis J held that the right in sec 26(1) was subject to sec 26(2), meaning that all the state could do was to undertake reasonable measures to realise the rights progressively. According to Davis, the state's progressive measures, intended to achieve long-term benefits, could not be interfered with by those seeking to jump the queue to get short-term benefits. However, as for children's rights in sec 28(1)(c), the judge held that they were not subject to the same limitations as sec 26(1); the state was under an immediate obligation to provide shelter for the children. The Court held that, because of the right to be cared for by one's parents, every child would be accompanied by his or her parents to the shelter provided by the state. The judge went on to hold that this did not mean that the parents were the bearers of the right to shelter.

resources'.[26] A reasonable programme, according to the Court, must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.[27] Each sphere of government must accept responsibility for the implementation of particular parts of a comprehensive and well co-ordinated programme.[28]

The Constitutional Court took a deferential approach by holding that the contours of this programme will be left to the state to decide.[29] The programme must, however, be balanced and flexible and must make appropriate provision for attention to short, medium and long term needs. 'A programme that excludes a significant segment of society cannot be said to be reasonable.'[30] Those whose needs are the most urgent and whose ability to enjoy all rights is most in peril must not be ignored by measures aimed at achieving realisation of the right.[31] Later, in *Minister of Health and Others v Treatment Action Campaign*,[32] the Constitutional Court added that for a public programme to meet the constitutional requirements of reasonableness, its contents must be made known appropriately.[33]

The Constitutional Court's approach has received both criticism and praise. The first major criticism stems from the Court's rejection of the notion of minimum core obligations as adopted by the ESCR Committee.[34] The second criticism is based on the failure to give content to the rights in sections 26(1) and 27(1).[35] The Court has also been criticised for failing to interrogate not only the effectiveness of the means chosen by the state to realise the rights, but also the sufficiency of resources. This is in addition to the failure to adequately question the appropriateness of budgetary allocations and the development of standards for examining the adequacy of resources allocated to a specific programme.

26 Para 38.
27 Para 39.
28 Para 40.
29 Para 41.
30 Para 43.
31 Para 44. The Constitutional Court also held that the programme must be reasonable both in conception and implementation: '[T]he formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme but which is not implemented reasonably will not constitute compliance with the state's obligations' (para 42).
32 2002 5 SA 721 (CC) (*TAC* case).
33 Para 123.
34 See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1. See also D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 144.
35 See Roux (n 12 above) and Brand (n 12 above).

Though it is not within the scope of this book, it is important to note that the Court has also been criticised for its approach to the children's rights in section 28(1)(c). As can be deduced from the express terms of this section, the rights it proclaims are not subject to the internal limitations as those enlisted in sections 26(2) and 27(2). However, the Constitutional Court in the *Grootboom* case held that the children's socio-economic rights are no different from the rights of everyone else in sections 26 and 27, which are subject to internal limitations. It held further that prioritising children's rights as immediate would produce anomalous results as children would be used as stepping stones for adults who would otherwise not qualify for the rights. This is because the obligation to provide for the socio-economic needs of children falls in the first place on their parents. According to the Court, at best, section 28(1)(c) only obligates the state to provide immediately for those children who have been removed from the care of their parents. This reading of the Constitutional Court is problematic; it avoids giving the children's rights any meaningful substantive content. One would endorse the view that section 28(1)(c) is an express manifestation of the minimum core obligations and is intended to ensure that children are provided for without delay. However, as is seen in the next sub-section, the rejection of the minimum core approach by the Court would make it difficult for the Court to endorse this reasoning. [36]

[36] See S Liebenberg, 'The interpretation of socio-economic rights' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 33-1 33-48; C Scott & P Alston 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 206; G van Bueren 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* 57; P de Vos 'The economic and social rights of children in South Africa's transitional Constitution' (1995) 2 *SA Public Law* 233; P de Vos 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* 67 88; B Bekink & D Brand 'Children's constitutional rights' in J Davel (ed) *Introduction to child law in South Africa* (2000) 169; and J Sloth-Nielsen 'Too little? Too late? The implications of the *Grootboom* case for state response to child headed households' (2003) 1 *Law, Democracy and Development* 113. Though in the *TAC* case the Constitutional Court softens its stance by holding that the state bears an obligation to care for children even when they are under the care of their parents, when the parents are unable to care for them, the Court does not go as far as accepting that the children's rights are immediate and a manifestation of the minimum core obligations. See C Mbazira & J Sloth-Nielsen 'Incy-wincey spider went climbing up again ... (Re)-assessing children's socio-economic rights and section 28(1)(c) of the Constitution' paper presented at Conference on Law and Transformative Justice in Post-Apartheid South Africa, 4 to 6 October 2006, hosted by the Nelson R Mandela School of Law, University of Fort Hare.

3.2.1 Rejection of the minimum core approach

Description of the minimum core obligations approach

The ESCR Committee has construed the provisions of ICESCR as engendering a minimum core obligation incumbent upon all state parties. The ESCR Committee 'is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party'.[37] The Committee has given as an example of a *prima facie* violation a state party in which any significant numbers of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.[38] The minimum core content of a right is its essential elements, without which the right risks losing its substantive significance as a right.[39] It is the level below which standards should not fall.[40] The minimum core approach does not require the division of rights according to their priority, rather it requires that each right be realised to the extent that provides for the basic needs of everyone.[41] The notion emphasises the fact that it is simply unacceptable for any human being to live without sufficient resources to maintain his or her survival.[42] The ESCR Committee has thus defined the minimum core obligations that attach to a significant

37 General Comment No 3 para 10.

38 As above.

39 Van Bueren (n 36 above) 58 has submitted that the minimum core provides socio-economic rights with a determinacy and certainty. She submits further that, for a right to be justiciable, there must be at least a minimum core of certainty; otherwise, it would be pointless to incorporate socio-economic rights in a justiciable bill of rights.

40 S Russell 'Minimum state obligations: International dimensions' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 15. According to Russell, the purpose of the minimum core is not to give the state an escape hatch for avoiding its responsibilities under ICESCR; instead it is the opposite: It is a way to take into account the fact that many socio-economic rights require resources that are simply not available in poor countries. Even in highly strained circumstances, such a state has an irreducible obligation to fulfil what it is assumed to be able to meet. The burden is on the state to prove otherwise (16).

41 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 141.

42 Bilchitz (2003) (n 34 above) 15.

number of rights in ICESCR.[43]

The minimum core obligations approach averts the danger of states relying on the concepts of 'progressive realisation' and 'to the maximum of [their] available resources' to render the rights in ICESCR meaningless. While states may take steps only to realise the rights progressively, certain obligations are immediate.[44] The notion challenges the conception of socio-economic rights as being programmatic and incapable of enforcement. It translates the rights from abstract entitlements to concrete rights that guarantee concrete individual goods and services. Additionally, the notion of minimum core obligations reduces inequality by playing a redistributive role. It ensures that resources are directed towards those who cannot meet their basic needs using their own means.

In addition to the Committee, the notion of minimum core obligations has received support elsewhere. The Maastricht Guidelines cite as a violation a state's failure to meet the minimum core obligation as defined by the ESCR Committee.[45] The United Nations Commission on Human Rights has given credence to the minimum core when it says that states are urged to consider benchmarks designed to give effect to the minimum core obligation to ensure respect for minimum levels of living for everyone.[46] The Inter-American Commission on Human Rights has said that the most vulnerable members of society should not be denied access to the

43 The ESCR Committee has thus strengthened the application of this notion by elaborating on what it considers to be the minimum core content of several of the rights guaranteed by ICESCR. See General Comment No 4, *The right to adequate housing* (6th session, 1991) UN Doc E/1992/23, annex III 114 (1991); General Comment No 12, *Right to adequate food* (20th session, 1999) UN Doc E/C.12/1999/5 (1999); General Comment No 13, *The right to education* (21st session, 1999) UN Doc E/C.12/1999/10 (1999); General Comment No 14 *The right to the highest attainable standard of health* (22nd session, 2000) UN Doc E/C.12/2000/4 (2000); and General Comment No 15, *The right to water* (29th session, 2003) UN Doc E/C.12/2002/11 (2002), all reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (2003).

44 A Chapman & S Russell 'Introduction' in A Chapman & S Russell (eds) *The core obligations: Building a framework for economic, social and cultural rights* (2002) 6. The notion emphasises that, in spite of the fact that the obligations in ICESCR may be fulfilled progressively; there are those obligations which are immediate. In this respect, the notion compliments arts 2(2) and (3), which put the need to realise the rights without discrimination above the conditions of progressive realisation and available resources. It is not surprising, therefore, that non-discrimination in extending the rights has been subsumed as one of the elements of the minimum core of every right. It also complements the interpretation of the ESCR Committee to the effect that the phrase 'progressive realisation' imposes an obligation on states to move as expeditiously and effectively as possible towards full realisation of the rights (General Comment No 3 para 9).

45 *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, text in B Ramcharan (ed) *Judicial protection of economic, social and cultural rights* (2005) 553 para 2.

46 UN Commission on Human Rights Res 1993/14.

basic needs for survival; that without satisfaction of these basic needs, an individual's survival is directly threatened, which obviously diminishes the individual's rights to life, personal security, and the right to participate in the political and economic processes.[47]

Nonetheless, in spite of the overwhelming support that the notion of the minimum core has received, its implementation still poses a number of challenges. For instance, it remains unclear as to whether the minimum standards refer to individual enjoyment of a right or to society-wide levels of enjoyment.[48] The ESCR Committee has said that a state in which 'a significant number of people is deprived of essential [needs] is, *prima facie*, failing to discharge its obligations'.[49] This might be taken to mean that the minimum core does not establish individual rights but looks at society as a whole from a relative perspective.[50] However, in several of its General Comments, the ESCR Committee has indicated that the minimum core refers to individual levels of enjoyment. For instance, in General Comment No 15, the Committee has said that '[t]he water supply for each person must be sufficient and continuous for personal and domestic uses'.[51] The Committee has also said that 'water facilities and services have to be accessible to *everyone* without discrimination'.[52]

Additionally, at the international level, it remains unclear as to whether the minimum core standards are international or state-specific.[53] The socio-economic contexts and needs of countries differ from country to country. Socio-economic variations between countries depend on factors such as economic and social history, the nature of the economic system and the resources at the disposal of a state. These variations will dictate that every country adopts that approach that best realises the socio-economic needs of its people

47 See Inter-American Commission on Human Rights Annual Report, 1993 OEA/Ser.L/V.85, February 1994, ch IV.

48 L Scott 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81 101.

49 General Comment No 3 para 10.

50 M Wesson '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284 298.

51 Para 12(a).

52 Para 12(c) (my emphasis). One of the main reasons why the reasonableness review approach, as it stands now, cannot lead to the realisation of the minimum core is because of its failure to focus on the individual. Instead, the reasonableness review approach emphasises society-wide levels of enjoyment by requiring a comprehensive and inclusive programme that takes care of short, medium and long-term needs. Although the Constitutional Court's approach requires that those in desperate need should be taken care of, it neither guarantees them individual entitlements nor holds that their needs should take priority over all other needs.

53 Craven (n 41 above) 141-2.

within the prevalent circumstances.[54] The most viable option, therefore, is to develop state specific standards, the 'relative core minimums', as opposed to 'absolute core minimums'.[55] This is because it would be inappropriate for poor states to be judged by the same standards as their rich counterparts. Yet, on the other hand, it would be inappropriate for the residents of rich countries if their states were judged by the same standards as the poor countries.[56]

The Constitutional Court's reluctance to adopt the minimum core approach

In addition to the reluctance to construct socio-economic rights as conferring individual entitlements, the rejection of the minimum core by the Constitutional Court has, amongst others, been based on the lack of the institutional capacity to assess what the minimum core would be for each right. According to the Court, it is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. In the Court's view, these will vary according to factors such as income,

54 A Eide 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 35 46. He submits that, because of this, as a minimum, all governments should establish a nation-wide system of identifying local needs and opportunities for the enjoyment of socio-economic rights. In doing this, the focus should be placed on identifying, in particular, the needs of groups which have the greatest difficulties in the enjoyment of these rights. See also B Andreassen *et al* 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in B Andreassen & A Eide (eds) *Human rights in developing countries 1987/88: A yearbook on human rights in countries receiving Nordic aid* (1988) 335.

55 Scott & Alston (n 36 above) 250. According to Craven (n 41 above) 42, the current practice of the ESCR Committee that requires states to establish bench marks of poverty eradication and to identify disadvantaged sectors of the population suggests that state specific minima are the only viable option.

56 See D Otto & D Wiseman 'In search of "effective remedies": Applying the International Covenant on Economic, Social and Cultural Rights in Australia' (2001) 7 *Australian Journal of Human Rights* 9. Socio-economic rights obligations can be operationalised by the use of country-specific indicators. These indicators could be used to measure the provision of identified minimal needs of the people such as nutrition, housing and health care needs. Andreassen *et al* (n 54 above) 341 have suggested that, by using these indicators, the scope of violation of socio-economic rights would be measured, eg, by referring to the percentage of the population not assured of the minimal threshold.

unemployment, availability of land and poverty, in addition to the differences between city and rural communities.[57]

However, the quotation above suggests that the Court left the possibility of adopting the minimum core approach open.[58] It seems as if it declined to define it simply because it did not have adequate information to enable it to do so.[59] This meant that in future, should the Constitutional Court muster sufficient experience and have adequate information before it, just like the Committee, it would be prepared to define the minimum core.[60] This notwithstanding, the approach of the Court subsequently pours cold water on this possibility. The Court later held that imposing a minimum core obligation on the state was imposing an impossible duty:

> It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it acts reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.[61]

This quotation suggests that the Constitutional Court considers immediate realisation of the minimum core to be impossible because

57 *Grootboom* case (n 16 above) para 32. In respect of the right of access to adequate housing, the Constitutional Court said that the determination of a minimum core for this right presents difficult questions. This is because the needs of people in the context of access to adequate housing are diverse: There are those who need land; others need both land and houses; yet others need financial assistance. There are also difficult questions relating to the definition of the minimum core in the context of a right to have access to adequate housing; in particular, whether the minimum core obligation should be defined generally or with regard to specific groups of people.

58 D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 485.

59 See paras 31-33. It has been suggested by Chapman & Russell (n 44 above) 18-19 that the minimum core obligations approach is woven through the *Grootboom* judgment, both explicitly and implicitly. They base this view on the statement in the judgment to the effect that a society must seek to ensure that the basic necessities of life are provided for all if it is to be a society based on human dignity, freedom and equality (*Grootboom* case, para 44). In my opinion, however, it is clear from the rest of the judgment that, at best, the Constitutional Court only applied the minimum core obligations approach in a pseudo manner. This is when it emphasised that a reasonable programme must make provision for those in desperate need. While this is an element of the minimum core of the right of access to housing and all other rights as based on non-discrimination, the manner in which it was applied by the Constitutional Court is incomplete. The Court does not define the needs of such desperate people as taking priority over all other needs. Yet the Court does not define, in precise terms, what the needs of the vulnerable are in relation to the right of access to adequate housing.

60 See *TAC* case (n 32 above) para 33.

61 *TAC* case (n 32 above) para 35.

the state cannot afford it.[62] It is, however, evident that the Court's conclusion is not based on any evidence adduced by the state to prove that it is impossible on its part to satisfy the minimum core. Contrary to the assertion in the *Grootboom* case that the Court cannot define the minimum core without sufficient information before it, the Constitutional Court in the *TAC* case, without any evidence, closes the possibility of the minimum core by describing it as something that is impossible to realise.

The Court ignores the fact that there is an evidential burden on the state not only to prove that the resources are inadequate, but also that it is striving to ensure the widest possible enjoyment of the rights in the circumstances.[63] The Constitutional Court ignores the need for this evidential burden and makes its own assumptions, unsupported by evidence, that the state does not have the resources to satisfy the minimum core. The state should also have been required to show that every effort is being exhausted towards meeting the basic needs in the circumstances.[64] This is because the notion of minimum core does not require that minimum levels of goods and services be provided irrespective of circumstances that may make this impossible.[65]

62 During the hearing of the case, one of the judges, Justice Sachs, engaged counsel in questions that sent the message that the minimum core was impossible. Justice Sachs asked counsel whether the minimum core meant that somebody living in the mountains could come to court and say that he wants water from a tap, even if the money spent on this demand would furnish water for 10 000 people on the lower plain. See A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in J Peris & S Kristian (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 150. However, this is a total disregard of the views of the ESCR Committee that 'resources play [a role] in assessing whether or not a country has discharged its minimum core obligations and that a state could attribute its failure to discharge the obligation to inadequacy of resources'.

63 The ESCR Committee has said that the availability of resources plays a role in determining whether a state has violated its minimum core obligations. However, a state must 'demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'. General Comment No 3 para 10. The ESCR Committee has added that 'even where the available resources are demonstrably inadequate, the obligation remains for the state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' (para 11). The Committee goes on to state that, moreover, the obligations to monitor the extent of the realisation, or more especially of the non-realisation, of socio-economic rights and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints (para 11). See also S Liebenberg 'Violations of socio-economic rights: The role of the South African Human Rights Commission' in P Andrews & S Ellman (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 419.

64 Wesson (n 50 above) 302. According to Pieterse (n 8 above), the Constitutional Court's rejection of the minimum core on the assumption that it would always lead to immediately enforceable entitlements against the state seems to indicate an ignorance of the function of the minimum core in international law, which expressly situates the concept within an overarching framework of progressive realisation and indicates that there may be circumstances in which non-compliance with the core obligations may be justified.

65 Pieterse (n 7 above) 142.

Provision of a minimum core therefore can be justified only in circumstances where non-provision cannot be 'justified by the state and where it is appropriate in the circumstances to order that the claimant be provided with the benefit'.[66] The state could still argue that it does not have the resources to meet the minimum core immediately. This, however, would not mean that the state is completely exculpated; it has to ensure maximum protection of the rights in the circumstances. This point is discussed in more detail later.

In addition to the problem of resources, one of the reasons why the Constitutional Court has declined to define the minimum core obligation is because of a conviction that people's needs vary. This links to the problem of polycentricism as discussed in chapter two.[67] The Court has, for instance, observed that determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. According to the Court, this is so because the needs in the context of access to adequate housing are diverse: 'There are those who need land; others need both land and houses; yet others need financial assistance.'[68]

This means that the minimum core is oblivious to context and the diversified needs that context gives rise to. The Constitutional Court's concerns have been broadened and endorsed by Liebenberg. She submits that the minimum core closes down debate and artificially curtails the evolution of standards of defining social needs as struggles around them unfold.[69] Liebenberg perceives the minimum core as setting rigid standards as to what the basic needs are; these standards 'would be insensitive to the varying circumstances of differently situated groups in society'.[70] This is what has motivated Liebenberg to retract her support for the minimum core obligations approach and to give backing to the reasonableness review approach. She submits that the reasonableness review approach is more suited for contextual application because of its flexibility arising from its

66 M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* 473 483.

67 Sec 2.3.4.

68 Para 33.

69 S Liebenberg 'Needs rights and transformation: Adjudicating social rights' (2005) Centre for Human Rights and Global Justice Working Paper No 8 27 sourced at http://www.nyuhr.org/docs/wp/Liebenberg%20%20Needs,%20Rights%20and%20Transformation.pdf (accessed 23 March 2006). Also published in (2006) 17 *Stellenbosch Law Review* 5.

70 S Liebenberg, 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 24. See also Pieterse (n 56 above) 491.

refusal to impose an absolute standard of performance.[71] Similar sentiments have been expressed by Steinberg, who submits that the minimum core approach would result in actual and perceived restrictions on the legislature. He endorses the reasonableness review approach as being standard-based rather than rule-based as the minimum core would be. Steinberg submits that the minimum core closes down the space to argue, for example, that to postpone other interests, such as promoting economic growth and job creation, is not the most legitimate interpretation of the Constitution.[72]

However, in my opinion, these concerns about the rigidity of the minimum core approach are taken care of by Liebenberg's suggestions in earlier writings. She has suggested elsewhere that acceptance of the minimum core does not require the court to define, in the abstract, the basket of goods and services that must be provided. Instead, the court could define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights. These principles, so she argues, would then be applied by the courts on a case-by-case basis to define the content of the rights in the circumstances.[73] The court would indicate the general principles of what is required to remedy the breach while leaving a margin of discretion to the state to decide the most appropriate means of

71 Liebenberg (n 36 above) 24. See also S Liebenberg, 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 73 81.

72 Steinberg (n 13 above) 273.

73 S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 159 175. See also Liebenberg (n 36 above) 33-31. Bilchitz (n 58 above) 487 has suggested that the duty of the courts is to identify general principles that specify the obligations of government or individuals which apply beyond the facts of each case. Bilchitz also contends that, in giving content to these socio-economic rights, a court engages in a process of specifying general principles that define the obligations placed upon the state by the right. One could submit that this would give a chance to those with the 'sharpest elbows' who make it to the courts to have their minimum core met at the expense of those who cannot access the courts. However, it is submitted in ch four that this depends on the form of justice that the court adopts. If the court adopts distributive, as opposed to corrective justice, it will be able to address the interests of similarly situated people as the applicants in a specific case (see sec 4.2.2 of ch four).

fulfilling the minimum core.[74] Liebenberg has given as an example a community suffering from starvation. It would be for the state to decide whether it fulfils their minimum core by cash grants, food vouchers or direct delivery of foodstuffs.[75] Indeed, 'the recognition and enforcement of socio-economic entitlements need not take the form of a once-off and comprehensive determination of need, coupled with a rigid insistence on adherence to acontextual standards'.[76] Actually, '[n]othing prohibits courts from incrementally awarding context-sensitive and need-specific, enforceable minimum content to section 27(1)(a) on a case-by-case basis'.[77]

For instance, the courts could define the minimum core of the right to water as, among others, requiring the state '[t]o ensure access to the minimum essential amount of water … that is sufficient and safe for personal and domestic uses to prevent disease'.[78] But the courts would not define the exact quantity of water since people differently placed may require different quantities for personal and domestic use and prevention of disease. It would be left to the state to decide what is sufficient in every circumstance. This though does not mean that the state's discretion is without constraint; any quantities chosen must be justified, either by scientific evidence or actual research addressed to a specific context. If the court thinks the quantities inadequate, it could step in and become prescriptive. In being prescriptive, however, the court should still rely on scientific and other evidence which defines the quantities either as adequate or inadequate.

It is submitted here that the deferential nature of this approach gives socio-economic rights content and also allows for contextual application of the minimum core. The contextual application of the minimum core is also enhanced by the discretion given to the state to choose the most appropriate way to realise the rights in every context. Of course, it cannot be ruled out that there could be those

74 Bilchitz (n 58 above) 488 has given as an example the minimum core of the right of access to adequate housing. The court, for instance, would hold that every South African must have access to accommodation that involves, at least, protection from the elements in a sanitary condition with access to basic services, such as toilets and running water. According to Bilchitz, the setting of this general standard, however, still raises significant questions as to the measures that will be adopted in particular cases. In Bilchitz's view, protection from the elements could involve the provision of tents or the provision of corrugated, galvanised iron such that people build their own shacks; but that whatever method is adopted would be for the legislature and executive to decide. Bilchitz adds that, even with such deference, the reasonableness of particular measures must be assessed against the general principles that the court interprets as defining the content of the right.

75 Liebenberg (n 73 above) 175.

76 Pieterse (n 56 above) 491.

77 As above.

78 General Comment No 15 para 37(a).

cases in which the courts may have to be prescriptive as to the precise means needed to realise a right in the circumstances.[79] However, the approach also has a potentially negative impact that needs to be guarded against. Definition of the core content of the rights using general principles may deprive the rights of their meaning and portray them as vague in nature. In spite of this, the strength of this approach lies in the fact that it gives the government leeway in choosing the most appropriate means and allows for their contextual application. This is because it does not present the minimum core as requiring any rigid standards or particular means by which it is to be realised. Yet, though broad standards are used here, the rights could still be made meaningful by defining them in an open-ended manner but which takes into account the purpose of each right.[80] Only when the rights are defined in this manner can one proclaim the existence of general standards upon which the state is evaluated in a variety of contexts.[81]

In addition to the above, the minimum core does not demand that a minimum level of goods and services be provided to everyone immediately. Indeed, the state may not have the resources needed for this to happen. This explains why the Constitutional Court has found that, even when all available resources are deployed, the state cannot afford a minimum core for everyone: 'It is impossible to give everyone access even to a "core" service immediately.'[82] As a matter of fact, it would be straining a country's resources for the minimum core to be provided to all. In fact, the minimum core obligation does not require that minimum levels of goods and services be provided to

79 If, eg, after being given reasonable time and opportunity to exercise its discretion and choose the most appropriate means, the state fails to do so, the court may decide to choose the means and order the state to carry them out. There also may be circumstances in which there is only one way of realising the rights, as was the case in the *TAC* case.

80 This is an exercise which does not require a lot of information on the part of the court. As has been shown in ch three (sec 2.3), courts have the expertise and experience in interpreting legal texts and subjecting policy, legislation and conduct to defined legal standards. Defining the minimum core would not present tasks different from this. According to Bilchitz (n 58 above) 488, in order to specify the standard that government must meet to comply with its obligations, it is not necessary for the court to have wide sources of information such as that available to the Committee. Such information may be necessary in order to decide on particular actions that the state is required to take in particular circumstances. However, it is not necessary in order for us to understand what the basic needs of people are. In Bilchitz's view, what the Grootboom community wanted was protection from the elements, and an environment that would not be injurious to their health. He adds that very few people would have difficulty in specifying the nature of their most basic needs and that the Constitutional Court overstates the matter when it depicts this as involving enormous complexity.

81 D Bilchitz 'Health' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2005) 56A-23.

82 *TAC* case (n 32 above) para 35.

all, including those who do not need it.[83] Most countries, including South Africa, have a substantial portion of their population living above minimal basic levels of living without direct dependence on the state.[84] With constrained resources, it would only be reasonable that the state provides the minimum core only to those who need it. All that the state has to do is to ensure minimum basic needs for those unable to provide for themselves without state support. This should be done simultaneously with efforts to enable those that are able to provide for themselves using their means to do so in a sustainable manner in the future.[85] This would require the state to identify those persons or categories of persons who are in need of the minimum core. The starting point is to identify different sectors and groups in society and, thereafter, to identify the most vulnerable who need a minimum threshold in each sector.[86] The sectors and groups could, for instance, include the rural and urban, and the formal and informal. The state would then ensure that a minimum level of goods and services is extended to the vulnerable in each sector or group. On the basis of this approach, one could submit that, by holding that a programme that does not include those in desperate need is unreasonable, the Constitutional Court has applied the minimum core.[87] The Court has said that:

> A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. *Those whose needs are the most urgent and whose ability to*

83 Roux has criticised the *Grootboom* case for not going far enough to constrain the state from spending scarce resources on relatively privileged groups for whom such assistance is an added advantage rather than a need. In Roux's opinion, this is because the interpretation in the case falls short of obliging government to order its spending priorities in a particular way. Rather, the decision is a statement for the proposition that the Constitution requires a diversification of social and economic policy to cater for vulnerable groups. T Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) *Constitutional Forum* 41 42.

84 Andreassen *et al* (n 54 above) 344. Although he uses it in a different context, Bilchitz (n 58 above) 489 illustrates this point by the example of the right of access to adequate housing in South Africa. He is of the view that the mere fact that people's needs are varied in relation to accessing the minimum core of housing does not affect the obligation of the state. According to Bilchitz, the fact that some people need access to land, some need land and houses, and others need financial assistance, is not relevant to the determination of the minimum core. In Bilchitz's opinion, each person is entitled to the same level of provision and the differential needs people have will determine in what way the government, if at all, is required to assist them. Eg, if the minimum core is the provision of shelter, those who have land and shelter will have no claim; those with land but with no shelter will have a claim to shelter; and those who have neither land nor shelter will have a claim to both land and shelter.

85 As more and more people cross into the 'able group', so is the reduction in pressure on the resources to provide for those who cannot provide for themselves.

86 Andreassen *et al* (n 54 above) 337.

87 Chapman & Russell (n 44 above) 18.

> *enjoy all rights therefore is most in peril*, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, *fail to respond to the needs of those most desperate*, they may not pass the test.[88]

The problem with the position of the Court is that it still fails to define any substantive entitlements for the vulnerable.[89] All it emphasises is that the programme should be inclusive and not disregard the most vulnerable. However, even when the state does not have the resources to provide the minimum core immediately, it should be able to provide some tangible goods and services to the most vulnerable as an interim measure. The ESCR Committee has stated that, even where the available resources are demonstrably inadequate, the obligation remains for the state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.[90] While the reasonableness review approach comes very close to this approach, it is deficient to the extent that it does not describe, in terms of content, what would have been due to the vulnerable had resources been adequate. Such a description is important as it guides the state on the levels of goods and services that ought to be realised as soon as resources become available. The state must also demonstrate its commitment to maintaining progressive realisation of the rights for all and improving the condition of the vulnerable over time.

How to prioritise the needs of the most vulnerable

The issue that one has to confront, however, is whether prioritising the needs of the most vulnerable has a negative effect on the capacity to progressively realise the rights of everyone else. 'Progressive realisation' could mean that the quality of life of all, including those living above the minimum threshold, improves. But this is not what the minimum core approach appears to require; the notion calls on states to accord a high level of priority to the basic needs of all and

88 Para 44 (my emphasis). In the same judgment, the Constitutional Court said that the minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. According to the Court, it is in this context that the concept of minimum core must be understood in international law (para 31).

89 Pieterse (n 56 above) 493.

90 General Comment No3 para 11.

especially of those who are in dire need.[91] Progressive improvement for those who already have a minimum level has to wait until everyone has had access to the basic needs.[92] But this does not mean that the state does not have any obligations towards those living above the minimum level. The state should avoid creating conditions that cripple the ability of those living above minimum levels to meet their needs on their own. The creation of such negative conditions would amount to retrogressive measures which are in themselves *prima facie* violations.[93]

The problem with the *Grootboom* case is that, while it requires protection of the needs of the most vulnerable, it does not require that provision for such needs should be high on the agenda.[94] All the Constitutional Court says is that the needs of such people should not be ignored by measures intended to realise the right for all in the long run. The Court demands that there should be a programme which is inclusive and possibly spreads resources to meet the short, medium and long-term needs simultaneously.[95] This approach therefore is about inclusiveness without compulsion that the state gives high priority to the needs of the most vulnerable. Indeed, in a recent paper, Liebenberg has described the reasonableness approach as a

91 According to Bilchitz (n 34 above) 15, the minimum core is a means of specifying priorities. It involves an injunction that priority must be given to those in a condition where their survival is threatened. He adds that any government programme must consider the needs of people in such a situation and assist them as a matter of priority. Blichitz adds further that the state cannot treat such people as representing one problem to be dealt with amongst others.

92 According to Liebenberg (n 70 above), the best approach would be one that in the first place requires the state to ensure that everyone has access to the minimum core and then, in the second place, the state must over time improve the quality of socio-economic rights to which individuals have access.

93 The ESCR Committee has said that any deliberate retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. General Comment No 3 (para 3).

94 See Roux (n 83 above) 42 47. Roux has said that, even if the South African government takes the *Grootboom* order seriously, this will only have an impact on the state's budget, but will not have an impact on the temporal order in which competing needs are met. In Roux's opinion, it is only the wholesome adoption of paragraph 10 of General Comment No 3 that would have required the government to devote all available resources to meet the needs of those without any kind of shelter before moving on to improving the life condition of everyone (47). See also Pieterse (n 8 above) 896. Roux has argued in another paper that had the Court required the government to prioritise the needs of those who need a minimum core over those who do not, it would have put itself in direct confrontation with the political branches whose duty it is to make budgetary allocations, that this is because the Court would have been substituting its views on resource allocation for those of the political branches (Roux (n 12 above) 97-98). However, it is submitted in this chapter that the minimum core could still be implemented in a manner that gives appropriate deference to the political branches. As mentioned above, the Court would have to define the minimum core using broad parameters and leave it to the state to choose the most appropriate means for its realisation.

95 See para 43 of the case.

formalistic and abstract approach which equates the needs of the wealthy with those of the poor by requiring government to be even-handed in attending to both.[96]

However, Wesson has expressed doubts about an approach that prioritises minimum core needs by requiring redistribution of resources from 'non-core' needs to the 'core needs' and only back to 'non-core' needs when the core is met for everyone.[97] In Wesson's opinion, this may be counterproductive. This is because the minimum core would not allow for a multi-layered approach to the realisation of socio-economic rights. She uses the *Grootboom* case to show that the multi-layered approach allows the state to employ a variety of measures to realise the right such as emergency relief, low-cost housing and provision of subsidies. Wesson also uses the example of the right to health to question the wisdom of diverting resources to 'non-core' needs, such as care for the chronically ill, to the 'core needs' of the right to health. In Wesson's opinion, this is not a course that society would be prepared to embark on, and she advocates an approach that would prioritise all needs. Wesson views as most promising an approach that only entails limited distribution; certain allocations, but not all, may be compromised to satisfy the core needs.

What Wesson does not realise, however, is that the prioritisation submission is not based on the assumption that the state will begin from scratch. Those services that are already being provided, though they do not constitute a minimum core, should continue to be provided. As mentioned above, their reduction would amount to retrogressive measures anyway. What is being advocated is that resources that would have otherwise been expended on improving non-core needs be directed to core needs. And as soon as the core is fully provided, then improvements to all will be made.

It is not submitted here that all other forms of expenditure should be suspended until the minimum core of those who are in need of it is met. Instead, I am submitting that more efforts should be directed to meet dire needs and less on needs that may not be necessary for survival. Expenditure on already established non-core needs should be sustained as any withdrawal would amount to retrogressive measures. The state should, however, enhance the quality of non-core needs only after it has met the core needs. All needs would then be progressively improved.

It should also be noted that the minimum core itself does not remain static; people's needs within every country should be

96 Liebenberg (n 70 above) 19.
97 Wesson (n 50 above) 303.

commensurate with the level of resources. As a country's resource levels increase, so does the level of the minimum needs of people. The state should at all times strive to see to it that people's standards of life improve. This will be reflected not only in the quantity, but also in the quality of the basic goods and services available for disposal to the people.[98] However, the state should only strive to improve the quality of life for all after bringing everyone above the minimum levels of life. Failure to do this only entrenches the wide-spread inequalities and social exclusion of the vulnerable. This, though, does not mean that the provision of services for those living above the minimum core should be suspended. All it means is that the needs of those living below the minimum core be prioritised by increased expenditure in their favour. It is true that the courts may not have the institutional capacity to ration resources to ensure such prioritisation. However, they have the capacity to evaluate the evidence before them and to determine whether priority is being accorded to the basic needs of the poor.

In order to steer the Constitutional Court towards prioritising the basic needs, it has been suggested that sections 26 and 27 should be read as giving rise to two types of duties that are delineated in the first and second subsections of each section. It has been submitted that, in the first place, subsection (1) requires the state to ensure that everyone has access to essential levels of goods and services and that, at the second stage, subsection (2) requires the state to improve the quality of the goods and services to which people already have access.[99] Bilchitz has contended that this approach 'avoids the creation of two self-standing rights, whilst retaining the important idea of progressive realisation and making reference to the purpose

98 I have, eg, submitted elsewhere that the people's minimum levels of water supply for domestic use increase as the service gets closer to them. A resident using a yard water tap uses less water as compared to a resident that has multiple taps in the house. It is on this ground that I have criticised the adequacy of the basic water supply that is supplied to all households in the same quantities, irrespective of the levels of access. In this regard, I suggest that the quantities of basic water should improve as access improves. But this is not to suggest that improvement should be effected before everyone has access to a core. See C Mbazira 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati' in J de Visser & C Mbazira (eds) *Water delivery: Public or private* (2006) 67.

99 Bilchitz (n 34 above) 11. See also Van Bueren (n 36 above) 60. Elsewhere, Van Bueren has argued that the minimum core must never be used as a reason for inertia; instead its adoption should be viewed as a springboard for further action by the state. G Van Bueren 'The minimum core obligations of states under article 10(3) of the International Covenant on Economic, Social and Cultural Rights' in Chapman & Russell ((n 44 above) 160.

behind the protection of human rights'.[100] While this approach realises socio-economic rights and gives them content as individual rights; situating the minimum core solely in subsection (1) fails to integrate the inadequacy of resources as a possible defence for failure to satisfy the minimum core obligations.[101]

As indicated above, a country can rely on inadequacy of resources to justify its failure to meet the minimum core obligations.[102] Reading the sections as proposed above suggests that the limitations in subsection (2), including inadequacy of resources, would only apply at the second level of progressive improvements from the minimum core. This means that if resource limitations are to be invoked as a defence, then this has to be derived from the notion of minimum core itself and not subsection (2). However, this is problematic: Since inadequacy of resources is expressly integrated in the Constitution, it would only be logical for this defence to derive from subsection (2). One would argue, though, that interpreting subsections (1) and (2) holistically would subject the minimum core to the notion of progressive realisation, thereby denying it meaning. However, this argument does not stand since the minimum core itself derives from the notion of progressive realisation.[103]

The minimum core approach stresses the point that, in spite of the fact that countries may realise the rights progressively, certain obligations have to be met immediately as a matter of priority.[104] It also emphasises the point that if the core content is not provided, irrespective of progressive realisation and acting within available resources, the rights would be rendered useless. On the basis of this, therefore, the minimum core can only be derived from reading subsection (1) together with (2), and not to isolate one from

100 Bilchitz (n 34 above) 12. Bilchitz contends further that sects 26 and 27 protect two kinds of interests which are linked by the notion of progressive realisation. The first is that, at a minimum level, people need to survive and for this they require basic goods and services; the second is the interest that people have in being provided with the conditions that enable them to pursue their own projects and live a good life by their own rights (10-11).

101 As discussed in the next section, this reading was rejected by the Constitutional Court in the *TAC* case.

102 See also Pieterse (n 56 above) 480.

103 Though not expressly, Bilchitz (n 58 above) 56A-36, appears to have abandoned his initial suggestions that the two subsections be read as giving rise to two different and self-standing obligations. He has submitted that the notion of progressive realisation should be read as involving two components: The first component is a minimum core, to realise, as a matter of priority, the minimally adequate provision required to meet basic needs; the second component is the duty to take steps to improve the adequacy of the provisions of resources over time.

104 Chapman & Russell (n 44 above) 6.

another.[105] Subsection (2) should be used as the starting point to justify the minimum core obligation as deriving from the notion of progressive realisation. Subsection (1) would define the minimum core content of the specific rights. A finding that an individual is entitled to a minimum core of goods and services under subsection (1) could still be vitiated under subsection (2). Sub-section (1) would also be used to give normative content to the right.

3.2.2 Giving the rights normative content

Connected to rejection of the minimum core obligations approach is the Constitutional Court's failure to give content to the socio-economic rights in the Constitution.[106] In all three decisions, *Soobramoney, Grootboom* and *TAC*, socio-economic rights have been interpreted in a manner that only entitles the beneficiaries of the rights granted in sections 26 and 27 to reasonable state action undertaken to progressively realise these rights subject to the available resources.[107] It is clear from subsection (2) of both sections 26 and 27 that what is required of the state is to realise the right mentioned in subsection (1). To this extent, one agrees with the Constitutional Court's decision in the *TAC* case that the two subsections must be read together. What the Court ignores, however, is the fact that these sections establish a goal as well as the means to achieve that goal.[108] The goal is that the rights in subsection (1) have to be realised but only through the means stated in subsection (2). If we take this further on the basis of what the Constitutional Court says, that is, that the two subsections have to be read together, it means that the means have to be understood in the context of the goal. We cannot test the efficacy, or even reasonableness, of the means used in realising the goal unless we know precisely what the goal entails.[109] The Constitutional Court should have begun by getting to grips with the content of the right; and only then would it have

[105] While the ESCR Committee has read the minimum core into a number of substantive rights in its General Comments, the notion itself has been derived from art 2(1), which defines the obligations almost in the same manner as secs 26(2) and 27(2) of the South African Constitution. This means that the notion uses art 2 as its basis for spreading out into the other articles of ICESCR.

[106] See C Mbazira 'Enforcement of socio-economic rights in South Africa: Strengthening the reasonableness approach' (2008) 28 *Nordic Journal of Human Rights* 131. See also Pieterse (n 7 above) 96.

[107] Brand (n 12 above) 38.

[108] Bilchitz (n 34 above) 143.

[109] Brand (n 12 above) 44. See also Bilchitz (n 34 above) 8; and D Bilchitz 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* 3.

been able to determine whether the measures adopted are reasonable methods of realising the right.[110] The failure of the Court to adopt this approach has serious implications for the efficacy of the remedies the Court may have chosen to address a violation.[111] It has been submitted that, in order to work out which considerations are relevant to a determination of reasonableness in each context, it is necessary to have a prior understanding of the general obligations government is under by virtue of having to realise the rights in question. Accordingly, the context-bound nature of a determination of reasonableness requires that one at least has some specification of standards they wish to be met in order to appraise the government's actions in a variety of contexts in terms of their potential to meet these standards.[112]

It should be noted further that the failure of the Court to give content to the rights leaves the government without guidance as to what is expected of it in implementing the rights.[113] It is not enough for the state to be told that it has to put in place an all-inclusive programme, without being told what that programme should set as its goal. It also makes it difficult for the court in its remedial orders to prescribe in precise terms what the government should do to remedy a violation. This lack of precision makes the task of enforcing court orders very difficult, since enforcers cannot point precisely to what needs to be done to remedy the violation. In this regard, Davis has submitted that if the Constitutional Court does not define these rights with any precision, the burden placed upon the executive by the courts is significantly increased.[114]

110 Bilchitz (n 109 above) 9; Bilchitz (n 58 above) 496; and M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 407. Pieterse has submitted that, where the reasonableness analysis is undertaken separately from an understanding of the content of various socio-economic rights and the obligations they impose, it may fail to develop a sound socio-economic rights jurisprudence (410).

111 Wells and Eaton have argued that in order to resolve issues related to constitutional remedies, courts need to identify the goals they seek to achieve in this area of law. They add that in this way, a court can evaluate the alternatives by asking which of them will better achieve the policies at stake. M Wells & E Eaton *Constitutional remedies: A reference book for the United States Constitution* (2002) xxv.

112 Bilchitz (n 34 above) 10. In Bilchitz's opinion, at present, the reasonableness review approach lacks a principled basis upon which decisions on socio-economic rights cases can be based. He submits that this heightens the attack on the legitimacy of the decisions of the court since it has not set out any principled standards upon which its decisions are based (10). See also Pieterse (n 110 above) 410. Elsewhere, Bilchitz (n 34 above) 3 has argued that one of the advantages of an approach that gives content to a right is that it places the interests that are affected under the spotlight and also questions the extent to which government policy detrimentally impacts upon these interests.

113 K Iles 'Limiting socio-economic rights: Beyond the internal limitation clauses' (2004) 20 *South African Journal on Human Rights* 448 454.

114 Davis (n 9 above) 304.

The Constitutional Court has emphasised that the rights in the Constitution must be understood in their contextual setting. According to the Court, this requires consideration of chapter two (the Bill of Rights) and the Constitution as a whole.[115] In respect of the right of access to adequate housing, the Court has held that section 26 must be understood in its context; the first subsection confers a general right of access to adequate housing and the second subsection establishes and delimits the scope of the positive obligations to realise that right.[116] The Constitutional Court has also held that subsections (1) and (2) are related and must be read together. It is not very clear what the Court means by the subsections being read together. What is clear from the Court's approach, however, is that it concentrates its interpretation efforts on subsection (2). This explains why in the *TAC* case, the Court dismissed the submissions of the *amici* to the effect that section 27 should be read as establishing two self-standing and independent rights: one an obligation to give effect to the sections 26(1) and 27(1) rights; the other a limited obligation to do so progressively through 'reasonable legislative and other measures, within its available resources'.[117]

The Constitutional Court held that the two subsections cannot be separated from each other; a reference to 'the right' in subsection (2) is clearly also a reference to the subsection (1) right.[118] The Court thus concluded that section 27(1) of the Constitution did not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Accordingly, sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to 'respect, protect, promote and fulfil' such rights — that the rights conferred by sections 26(1) and

115 *Grootboom* case (n 16 above) para 22.

116 Para 21.

117 Para 29. The *amici* argued that the right to health care in sec 27(1)(a) is one of the rights in the Bill of Rights and accordingly attracts the duties imposed on the state by sec 7(2) and that there is nothing in sec 27(2) to suggest that the duties it imposes replace any of the duties imposed on the state by sect 7(2). The *amici* went on to submit that, to give meaningful content to the constitutional right of every person to have access to the goods and services described in sec 27(1), there must be some concomitant duty on the state to make those goods and services accessible to '*everyone*'. According to the *amici*, sec 27(2) does not do so because it is a '*macro*' duty and not one that obliges the state to make the goods and services accessible to every person or any particular person. It accordingly cannot be exhaustive of the positive duties imposed on the state. See Submissions of the Community Law Centre and the Institute for Democracy in South Africa (IDASA) in *Minister of Health and Others v Treatment Action Campaign and Others*, sourced at http://www.communitylawcentre.org.za/ ser/docs_2002/ TAC_MTCT_Case_Heads_of_Arguments.doc (accessed 22 February 2006) paras 15-27.

118 Para 30.

27(1) are to have 'access' to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).[119]

The approach of the Constitutional Court in conflating the two subsections has also rendered section 7(2) redundant. This is in as far as the section obligates the state to respect and protect the rights. Generally, these two obligations are not dependent on resources and therefore may not be subjected to progressive realisation.[120] Reading the two subsections holistically means that the duties to respect and protect the rights in sections 26(1) and 27(1) are also subject to progressive realisation and available resources. Yet, as long as the content of the rights is not defined, it will be hard to determine whether the means chosen to realise them are effective. Nonetheless, even when the content has been defined, the courts have to develop a sound approach for testing effectiveness of the means chosen. Thus far, the reasonableness review approach has failed to do so, as is discussed in the next section.

Interrogating the means and end: A proportionality test

The Constitutional Court has been criticised for adopting a weak administrative law approach in interpreting socio-economic rights instead of a full blown proportionality test.[121] Some scholars, however, contend that the administrative law approach of the Court is the most appropriate; it allows courts to strike a balance between judicial activism and judicial deference. It has thus been submitted that, by retreating to the comfort zone of administrative law, the Court has 'made an important conceptual gain - it has mapped out a (what it considers appropriate) role for the judiciary in adjudicating the often polycentric issues raised by social rights claims'.[122]

119 Para 39.
120 See ch two sec 2.2.4.
121 Bilchitz (n 34 above) 2; see also Pieterse (n 8 above) 863 and Roux (n 12 above) 97.
122 Pieterse (n 8 above) 893. See also C Sunstein, *Social and economic rights? Lessons from South Africa* (May 2001), Public Law Working Paper No 12; University of Chicago Law & Economics, Olin Working Paper No 124, sourced at http://papers.ssrn.com/paper.taf?abstract_id=269657 (accessed 27 July 2004). However, Pieterse (n 8 above) 896 has endorsed criticism to the effect that the Constitutional Court's approach neither serves to prioritise certain forms of social expenditure over others, nor to treat the social deprivation of citizens as anything more than ancillary concerns to an inquiry that in essence amounts to an insistence on coherence, flexibility, fairness, inclusiveness, and rationality in social policy formulation and implementation. Pieterse is of the view that the Constitutional Court's approach does not offer South Africans any socio-economic entitlements other than those they have always enjoyed under administrative law, which have proved useless in alleviating poverty.

The question, however, is whether the reasonableness review approach is an administrative law approach, as has been suggested.[123] As is demonstrated later, the reasonableness review approach has established standards of scrutiny that are quite different from those established by administrative law.[124]

According to Fredman, in an administrative law case an agency has a duty of accountability, which means that it must explain why it has adopted a particular allocation of resources and not another.[125] In such a case, the duty of the court becomes one of guarding against arbitrariness in resource allocation.[126] The burden imposed on the state in this case would be one of justification. In the context of sections 26 and 27, the state would have to justify its programmes as reasonable and undertaken 'within the available resources'. This approach is akin to what was suggested by Mureinik as to how the Bill of Rights could be reviewed to quell fears that judicial review is countermajoritarian.[127] Mureinik's suggested approach was intended to ensure that government decisions are rational, while at the same time restricting the court's intrusiveness by allowing the state a wide margin of discretion. Mureinik suggested that all that the state would have to do was to justify its decisions; such decisions would only be struck down by the court if the state 'could not offer a plausible justification for the programme it has chosen'.[128] Mureinik contended that 'any decision maker who is aware … of the risk of being required to justify a decision will always consider it more closely than if there was no risk'.[129]

Mureinik's form of constitutional review fares partly in the *Soobramoney* case. In this case, the Constitutional Court held that it 'will be slow to interfere with rational decisions taken in good faith

123 See C Sunstein *Designing democracy: What constitutions do* (2001) 224. See also Bilchitz (n 81 above) 56Ã-11.

124 See Wesson (n 50 above) 287; and Steinberg (n 13 above) 277.

125 S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163 176. See also Davis (n 9 above) 304.

126 Sunstein (n 123 above) 224-37.

127 E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464.

128 Mureinik (n 127 above) 471. In a subsequent article, Mureinik describes the new constitutional order as a bridge from a culture of authoritarianism, that characterised apartheid, to a culture of justification; a culture in which every exercise of public power is supposed to be justified. E Mureinik 'A bridge to where? Introduction to the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31. See also generally K Karl 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 147.

129 Mureinik (n 127 above) 471. He submits that such decision maker is put under pressure consciously to consider and meet all the objections and thoughtfully to discard all the alternatives to the decision contemplated.

by the political organs and medical authorities whose responsibility it is to deal with such matters'.[130] As a result, the Court endorsed as rational a decision that scarce medical resources need not be expended on chronically ill patients at the expense of patients with a hope of recovery. The Constitutional Court has gone a step further by invoking not rationality as the basis of justification, but reasonableness. This is a standard expressly proclaimed by the relevant provisions of the Constitution. The problem with the approach of the Court, however, is that it does not require the state to justify its programme as reasonable. Instead, the burden is on whoever is contesting the state's programme to demonstrate its unreasonableness. The question therefore remains whether the administrative law standard of judicial review takes the same approach.

Does the Constitutional Court's approach use an administrative law standard?

The use of the 'reasonableness' concept in administrative law differs from the way in which it has been used by the Constitutional Court in socio-economic rights litigation. Most notable is the fact that reasonableness in socio-economic rights litigation considers such values as human dignity, equality and freedom in its assessment. These values do not feature in the administrative law scrutiny.[131] It cannot be denied, though, that there are some areas of commonality. The first area of commonality is the principle that the state should be given leeway to choose the most appropriate way of discharging its legal obligations. The second is the contextual definition and application of reasonableness.[132]

The reasonableness test now used in administrative law originates in English common law, as first set out in *Associated Provincial Picture Houses v Wednesbury Corporation*.[133] In this case, it was held that a court is entitled to interfere with the decision of an administrative body only if the decision is so unreasonable that no reasonable body would have taken such a decision.[134] The court held further that, even in such a case, it is not the duty of the court to decide whether a decision is or is not reasonable. The court said that this kind of decision is an executive function, which requires that deference be shown to the administrative authorities. The court's duty is only to

130 Para 58.
131 Steinberg (n 13 above) 277. See also *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 29.
132 Steinberg (n 13 above) 277.
133 [1947] 2 All ER 680 (*Wednesbury* case).
134 683 E.

determine whether the decision is of a kind that a reasonable authority could not have taken.[135]

The *Wednesbury* case principles have become part of South African administrative law and are endorsed by a string of judicial decisions. For instance, in *Union Government v Union Steel Corporation*, [136] it was held that no judgment has accepted that unreasonableness is a sufficient ground for interference with an administrative decision. Interference is only necessary if the unreasonableness is so gross that something else is inferred from it.[137] The provisions of the 1996 Constitution have not altered these principles in any fundamental manner. What is new, however, is that the right to just administrative action is no longer merely a common law right.[138] Instead, it is now a constitutional guarantee that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair'.[139] This section is implemented by the Promotion of Administrative Justice Act (PAJA),[140] which retains unreasonableness as a ground of judicial review in the same way as used in the *Wednesbury* case. The Act provides that a court may review administrative action which 'is so unreasonable that no reasonable person could have … carried out the function [in that manner]'.[141] It should be noted that in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[142] the Constitutional Court, when interpreting section 6(2(h) of PAJA, advanced beyond the *Wednesbury* principle. The Court held that:

[135] 683 E-G. Of course, one finds it hard to see a clear distinction between determining whether a decision is reasonable, on the one hand, and whether it is a decision that could not have been taken by a reasonable authority, on the other hand. Both appear to lead to an inquiry as to whether the decision is reasonable. The principles in the *Wednesbury* case have been followed by English courts in subsequent cases and have informed the approach to judicial review on the ground of unreasonableness; though in some cases, the courts have used irrationality in the place of unreasonableness. However, within English law, these two principles mean the same. See *Wheeler v Leicester City Council* [1985] AC 1054.

[136] 1928 AD 220.

[137] 236. See also *Shidiack v Union Government* 1912 AD 746, and *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 3 SA 726 (A). For a discussion of these cases, see C Hoexter & R Lyster *The new constitutional and administrative law* (2002) Juta Law 171.

[138] See *President of the RSA and Others v SARFU and Others* 1999 10 BCLR 1059 (CC) para 135.

[139] Sec 33. The Constitutional Court in *Pharmaceutical Manufacturers of SA; In Re: Ex parte Application of the President of the Republic of South Africa* 2000 3 BCLR 241 (CC) held that, though the common law principles of judicial review in administrative law are still relevant to the development of public law, judicial review is now subject to the prescriptions of the Constitution. The Court said that the principles of common law have been subsumed by the Constitution and are applicable as long as they are consistent with the Constitution (paras 45 & 51).

[140] Act 3 of 2000.

[141] Sec 6(2)(h).

[142] 2004 7 BCLR 687 (CC).

> The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if … it is one that a reasonable decision-maker could not reach.
>
> What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.[143]

'Reasonableness' in socio-economic rights litigation has not been used in the above manner. In socio-economic rights litigation, the court requires that there be a reasonable programme, which must be comprehensive, well co-ordinated and capable of providing for short, medium and long-term needs simultaneously. It must be reasonably conceived as well as implemented and made known appropriately.[144] The Constitutional Court's finding in the *Grootboom* case that the state's housing programme was unreasonable was not based on any finding that the programme could not have been adopted by any reasonable authority. If this had been the test, the programme would have passed with flying colours.[145] Instead, the Court found the housing programme unreasonable because of its failure to make provision for short term needs.[146]

In another twist, PAJA has introduced, among others, a test of rational connectivity by empowering the courts to review administrative action which is not rationally connected to the purpose for which it was taken.[147] According to Hoexter, one of the leading South African administrative law scholars, a reasonable decision is rational in the sense that it is supported by the evidence and information before the decision maker and the reasons given for it; and in the sense that it is rationally connected to its purpose, or objectively capable of furthering that purpose. In this regard, one must add, however, that a reasonable decision also reveals

143 Paras 44-45 (footnotes omitted).
144 See sec 3.2.1 above.
145 Wesson (n 50 above) 291.
146 Para 66.
147 Sec 6(2)(f)(i).

proportionality between ends and means, benefits and detriments. Hoexter adds that a reasonable decision must have reasonable *effects* as well as a rational *structure* and that proportionality, a principle that is more specific than bald 'reasonableness', indicates more clearly than the latter term the sort of conduct it seeks to prevent.[148]

There is no similar test in the Constitutional Court's reasonableness review approach. The Court has not enquired whether the means chosen by the government are rationally connected to the purpose of realising the rights. While the reasonableness review approach may result in the court questioning the connection between the policy, which is the means, and the right, which is the goal, the inquiry has not yet been carried out as a prerequisite under the reasonableness review approach.[149] This is because there is no principle that imposes a burden on the state to prove this connection.[150]

The most viable approach would be one that questions the effectiveness of the means chosen by the state. In addition to PAJA, this approach has also been used effectively in the general limitation clause inquiry set out in section 36 of the Constitution. Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. As is demonstrated below, it is for this reason that the section 36(1) approach could play an important role in socio-economic rights litigation. While it is not appropriate to apply section 36 directly when

148 C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 511.

149 Brand (n 12 above) 39. Roux (n 12 above) 97 submits that the Constitutional Court's reasonableness review standard is clearly stricter than the rational basis standard applied under sec 9(1) of the Constitution. The requirement that a programme be comprehensive, balanced and flexible means that the court must do more than inquire whether the legislation or policy at issue is rationally related to a legitimate government purpose; the court has to assess whether the social programme unreasonably excludes the segment of society to which the claimant belongs. However, Roux's position rests on shaky ground. In the first place, there is no evidence in the judgments to suggest that exclusion of certain segments of society may be reasonable in some circumstances. Most importantly, this approach still fails to interrogate the effectiveness of the means chosen to realise the rights. It only supports the *Soobramoney* case's rationality test by insisting that a court, in determining whether an action is justified, will have to consider whether the exclusion of a group is justified.

150 D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 45.

dealing with sections 26 and 27, some of the principles underlying section 36 may be of assistance.

The manner in which section 36 is crafted and has been applied suggests that it is more suited for negative obligations and is of limited application to positive obligations. By its very nature, the section requires the state to justify restrictions imposed on a particular right. Though violations of socio-economic rights may occur when restrictions are placed on them, a violation of these rights in most cases arises from the state's failure to provide for the rights in affirmative terms. The other reason why the general limitation clause cannot be applied to all violations of socio-economic rights is because section 36(1) envisages limitations resulting from a law of general application.[151] While socio-economic rights may be limited by legislation, in some cases, they are limited by policy measures or sheer administrative decisions. Such form of limitation is not excluded by the internal limitation clause.[152] This is an issue which those who advocate the application of section 36(1) to socio-economic rights litigation have ignored in their discussion.[153] The limitations imposed on the socio-economic rights in sections 26(1) and 27(1) are expressly prescribed in sections 26(2) and 27(2). In *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others*,[154] the Constitutional Court held that there is a difficulty in applying section 36(1) of the Constitution to the socio-economic rights entrenched in sections 26 and 27 because these sections contain an internal limitation which qualifies the rights. According to the Court, the state's obligation in respect of these rights goes further than to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights. The Court was of the view that section 36 can only have relevance if what is 'reasonable' for the purposes of section 36(1) is different from what is 'reasonable' for purposes of sections 26 and 27.[155] What needs to be done, however, is to read a proportionality test into sections 26(2) and 27(2). This is where some of the principles used under the general limitation clause analysis process may become relevant.

151 See I Currie & J de Waal *The Bill of Rights handbook* (2005) 594.
152 See Liebenberg (n 70 above) 28.
153 See, eg, Iles (n 113 above); Pieterse (n 110 above); and Liebenberg (n 63 above) 423-424.
154 2004 6 BCLR 596 (CC) (*Khosa* case).
155 Para 83. See also para 105.

Proportionality and rational connectivity

To heighten the level of scrutiny under the general limitation clause, a proportionality test, as inspired by Canadian jurisprudence[156] and as is implicit in section 36(1), has been employed by the Constitutional Court. The proportionality test has been applied in the section 36 enquiry to determine whether a limitation is reasonable and justifiable in an open and democratic society. In the *Makwanyane* case, the Constitutional Court held that the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality. The fact that the different rights have different implications for democracy and, in the case of the Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. The Court said that principles can be established, but the application of these principles to particular circumstances can only be done on a case-by-case basis. The Court went on to hold that this is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, according to the Court, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, and whether the desired ends could reasonably be achieved through other means less damaging to the right.[157]

In *S v Bhulwana*,[158] the Constitutional Court held that there is a need to place the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be.[159]

There is room for application of a similar proportionality test in socio-economic rights litigation. This is especially in those cases where the state has failed to provide socio-economic goods and services on the ground that their provision would affect certain interests. An example of such case is the *Khosa* case. One could, however, submit that the *Khosa* case is not a good example since it was based on a negative violation under section 9 of the Constitution

156 See *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200.
157 Para 104.
158 1996 1 SA 388 (CC) (*Bhulwana* case).
159 Para 18.

arising from the exclusion of the applicants from the social assistance scheme. Nevertheless, the case also invoked positive obligations; the state argued that including the applicants in the social assistance scheme would impose financial burdens on the state and discourage self sufficiency amongst non-citizens.[160] In effect, the state was arguing that, even if there was an obligation to provide for the applicants, it just did not have the resources to discharge this obligation. Indeed, enforcing the applicant's rights would not only entail their inclusion in the programme, but also a commitment of resources to meet their social assistance needs. The state was also arguing in effect that provision of the benefits requested would have had a negative impact on such interests as the need to promote self-sufficiency of non-citizens.

The Court held that once those not self-sufficient are granted permanent resident status, then the state has a duty to provide for them. This is irrespective of the financial burden that may be imposed on the state.[161] The application of the proportionality test in this case is seen in the finding that providing social assistance to the applicants outweighed the financial and immigration concerns of the state.[162] The values embedded in the protection of the survival interests of non-citizens were considered by the Constitutional Court to outweigh the financial and other considerations raised by the state. The Court said that the importance of providing access to social assistance to all who live in South Africa and the impact upon life and dignity that a denial of such access far outweighs the financial and immigration considerations on which the state relied. Accordingly, 'the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution'.[163]

The Constitutional Court in the passage above appears to suggest that proportionality has a role to play in considering whether or not the measures adopted by the state are reasonable. The Court appears to have been inspired to apply this test because of the direct invocation by the applicants of the right to equality in section 9.[164]

160 Paras 60 & 63.
161 Para 68.
162 Liebenberg (n 70 above) 21.
163 Para 82.
164 The proportionality test has featured strongly in the approach that the Constitutional Court has adopted in considering equality cases. This is most especially at the stage of considering whether discrimination amounts to unfair discrimination. See *Harksen v Lane NO* 1998 1 SA 300 (CC) para 53. At this stage of the equality inquiry, the court has to consider the impact of the discrimination on the victim. If the discrimination burdens people who have in the past been victims of discrimination, then it will be unfair unless the purpose it intends to achieve outweighs the burdens imposed. This requires a proportionality test

Another case where the Court has applied the proportionality test is *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* (*Kyalami* case).[165] In this case, the Court applied the proportionality test to uphold the right of access to adequate housing against the right to property. The Court held that, although the property interests of the Kyalami residents was only a factor, the interests of the flood victims and their constitutional right of access to adequate housing was also a factor to be considered.[166] According to the Court, the fact that property values may be affected by a low-cost housing development on neighbouring land is a fact that is relevant, it is only a factor and could not in the circumstances of the case stand in the way of the constitutional obligation that the government has to address the needs of homeless people.[167]

The test, as applied above, is very important because it strengthens the remedies granted in socio-economic rights litigation. The *Kyalami* case also shows how the proportionality test can be applied to cases that invoke purely positive obligations. One cannot therefore use the *Khosa* case to argue that the test is only applicable to cases invoking negative violations. It should be noted that the use of this test is the only way through which the undue burden imposed on litigants in socio-economic rights cases to prove the unreasonableness of the state's measures can be shifted to the state. This test compels the state to put before the courts adequate evidence, which will allow them to make informed decisions. Indeed, as will be seen in the next section, the Constitutional Court in the *Khosa* case held that the state had an evidential burden to put all relevant information before the court. This is especially so in cases where court orders would have budgetary implications. Such evidence may be necessary for the purpose of determining the most appropriate remedy. A finding that the means are not proportionate could be used by the court to determine the degree of intervention required at the remedial stage.

Also part of the section 36 enquiry is a set of factors that have to be considered in determining whether a limitation is reasonable and

which requires, amongst others, an examination of whether there are less burdensome means that could have been adopted. See *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Pretoria City Council v Walker* 1998 2 SA 363 (CC); and *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC).

165 2001 3 SA 1151 (CC). For a detailed discussion of the facts and issue in this case, see ch two sec 2.2.4

166 Para 106.

167 Para 107.

justifiable in an open and democratic society based on human dignity, equality and freedom. One such a factor is whether there is a rational connection between the means chosen to limit the rights and the objective to be served by the limitation.[168] As already stated, a similar test is provided for by PAJA as a basis for reviewing administrative action. Another factor is whether there are less restrictive means of realising the rights.[169] The court must assess the selected means to determine whether they could have been used in a manner that is less restrictive to the right(s) to realise the same object.[170] 'A court will … need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.'[171] In doing this, the court must not, however, 'second-guess the wisdom of policy choices made by legislators'.[172] Instead, the court must leave a margin of discretion to the state in selecting the most effective means.[173]

A similar standard could be employed by the courts in sections 26 and 27 litigation to question the effectiveness of the means chosen to realise the rights. The court would have to enquire whether the means chosen by the state are capable of realising the socio-economic right or rights in issue. This rational connection standard would be applied as part of the reasonableness test. For a programme or policy to be reasonable, the state would have to convince the court that the programme or policy is capable of realising the targeted socio-economic right(s). Where the programme or policy restricts the rights in one way or another, the court would enquire whether there are less restrictive means of achieving the purpose of the programme or policy without restricting enjoyment of the socio-economic right(s).[174] However, the court in this process would be alive to the fact that there are several ways of effectively realising socio-economic rights. Deference would be shown to the state in choosing from amongst

168 Currie & De Waal (n 151 above) 182. See also *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) and Others* 2004 5 BCLR 445 (CC).

169 In the *Makwanyane* case ((n 6 above), the state argued that the objects to be achieved by the imposition of the death penalty were to prevent and deter commission of violent crime. The Constitutional Court held that, while the death penalty may effectively prevent criminals from committing crime again (since the criminal is dead), the state had not adduced sufficient evidence to prove that the penalty actually deterred the commission of crime (para 184). In this latter respect, therefore, there was no relation between the means and the object.

170 Criticism has been directed at this approach on the grounds that it allows courts to strike down legislation under the guise of there being less restrictive means of limitation. The task of determining the means of restricting rights, so goes the argument, is not one that the courts are qualified to discharge because this is either a legislative or executive function. See S Woolman 'Limitation' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1995) 12-i-12-64 12-8.

171 *Oakes* case (n 156 above) 138.

172 *Makwanyane* case (n 6 above) para 104.

173 Currie & De Waal (n 151 above) 184.

174 Liebenberg (n 70 above) 27.

those means; the state would, therefore, have the discretion to determine what it considers to be the best way of realising the right(s).[175] All that the court would do is to ensure that the means selected by the state are capable of realising the right(s). However, where the means chosen by the state are demonstrably inadequate and incapable of reasonably realising the right(s), then the court should intervene. At this stage, the court should be entitled to be prescriptive by detailing what in its opinion is the best way of realising the right(s).

The above approach would not only allow enquiry into the effectiveness of the means chosen, but would also compel the court to give content to the rights. This is because there would be no way the court could assess the effectiveness of the means chosen without an understanding of the goal to be achieved, which is the realisation of the right. This approach would also promote the constitutional values of accountability, responsiveness and openness as it demands for justification from the state. Similar standards of justification could also be used in the available resources inquiry as discussed in the next section. The conclusion of the court after interrogating the effectiveness of the means chosen to realise the rights is relevant at the stage of determining the most appropriate remedy. The court would be able to determine the kind of remedy that effectively compels the state to adopt measures that realise the rights.

3.2.3 Available resources and a justification inquiry

At both the international and South African levels, in realising socio-economic rights, the state can only do as much as its resources permit. While ICESCR uses the phrase 'to the maximum of … [a state's] available resources'[176] and the South African Constitution uses the phrase 'within … [a state's] available resources',[177] as already noted,[178] the differences between these two are, at best, nomenclatural. In this section, the phrase 'within the state's available resources' is used because it is the one used in the South African Constitution, but at the same time, reference is made to 'the maximum of the states' available resources', where necessary, to illustrate standards at the international level.

[175] This would quell fears that the courts are going to hide under the cloak of choosing the most effective means to carry out functions that are reserved for the executive and legislative organs of the state. See S Woolman 'Limitation' in M Chaskalson *et al* (eds) (1996) *Constitutional law of South* Africa (1996) 12-8.

[176] Art 2(1).

[177] Secs 26(2) & 27(2).

[178] Sec 3.1.

The phrase 'within available resources' has mostly been used in a rhetorical manner, without any meaningful attempts to define it and to understand the precise nature of the obligations it imposes.[179] Unless we come to grips with the nature of the obligations that the requirement to act within the available gives rise to, it may be difficult to translate socio-economic rights from mere abstract paper rights to concrete individualised rights.[180] This is because the concept of available resources presents an obstacle to the realisation of these rights. However, the concept also represents the world of scarcity in which we live, which makes it impossible for the state to fully realise all the rights protected. Yet, at the same time, scarcity imposes an obligation on the state to ensure more efficient use of the scarce resources in order to realise the rights to the extent attainable in the circumstances.

Looked at narrowly, the concept of acting 'within available resources' is available to the state as a defence to justify its failure to fully realise socio-economic rights or even to provide a minimum level of goods and services. Indeed, in the majority of socio-economic rights cases, the state is always quick to demonstrate that it lacks the resources needed to fully realise the right(s).[181] Nonetheless, the

[179] According to Chapman, we cannot effectively use the standard of progressive realisation as a tool of assessing compliance with the standards established by ICESCR unless we understand what is meant by the phrase 'maximum of its available resources'. A Chapman 'A new approach to monitoring the International Covenant on Economic, Social and Cultural Rights' (1995) 55 *International Commission of Jurists: The Review* 23 26. All that the ESCR Committee has said in General Comment No 3 about the meaning of the phrase 'the maximum of the available resources' is that it was 'intended by the drafters of the Covenant to refer to both the resources existing within a state and those available from the international community through international co-operation and assistance' (para 13). In my opinion, this is very narrow; surely, the drafters must have meant more than this in this phrase. ICESCR, besides elaborating the obligations of international co-operation, does not elucidate on what states have to do within the domestic arena to ensure that sufficient resources are allocated for the purpose of realising the rights. Yet, as argued in ch two sec 2.2.4, the various methods employed by the ESCR Committee to determine the appropriateness of resources dedicated to realisation of the rights are flawed in a number of respects.

[180] E Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 694.

[181] See, eg, the *Soobramoney* (n 19 above), *Grootboom* (n 16 above) and *Khosa* cases.

concept also gives rise to a number of positive obligations that can be enforced against the state.[182] In this respect, the concept may be used, for instance, to force the state to undertake positive measures to ensure that resources are made available or efficiently employed.[183] This latter dimension begins from the premise that the state does not have sufficient resources to realise the rights. It, however, emphasises the point that the state should not resign itself to fate, but should exhaust all efforts to enhance its resource pool and to employ the resources in the most efficient way. To enforce these obligations, a court would first establish whether, indeed, the state does or does not have all the resources required to fully realise the right(s) in contest.[184] However, where the state contends that it has actually allocated the requisite resources towards the realisation of the right or rights, the role of the court here becomes very difficult. This is because the court would have to determine whether the allocated resources are capable of realising the right(s) and whether they have been employed efficiently. The question at this stage, however, is whether the courts have the skills and tools, let alone the institutional legitimacy, to determine whether the resources are capable of achieving the intended purpose and whether they have been employed efficiently.

Determining whether the state has undertaken reasonable measures to provide sufficient resources to realise the right(s) and whether it has used the available resources effectively involves very difficult questions.[185] The courts may not be institutionally capable of answering these questions. Such questions, for instance, include: Is the state's economic strategy the most appropriate to achieve its goal? Should the state engage in mining and not agriculture? Should it

[182] Liebenberg (n 36 above) 33-44. According to Moellendorf, the phrase 'available resources', however ambiguous, has both narrow and broad senses. It may mean those resources that a ministry or department has been allotted for the protection of a right; but it may also mean any resources that the state can marshal to protect a right. D Moellendorf 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' (1998) 14 *South African Journal on Human Rights* 330.

[183] This meaning can be supported by the views of the ESCR Committee to the effect that a state that raises the defence of resources as the reason for not being able to realise the minimum core has a burden to demonstrate that it has used its resources in a manner that ensures maximum realisation of the rights. General Comment No 3 (paras 10 & 11).

[184] Robertson (n 180 above) 694-695 and 705-708 has defined resources to include just more than financial resources. Other elements of resources, in his opinion, include human resources, technological resources, information resources and natural resources. He also contends that resources go beyond those that are controlled by the state. In his opinion, the question becomes one of the extent to which these can be considered resources (695).

[185] In this regard, Hamilton argued in the 78th Federalist Paper that, because it will be least in capacity to annoy or injure them, the judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. *The Federalist No 78* (A Hamilton) (B Wright ed 1961) 490.

increase the levels of taxation and borrow less? Or should it rely more on donor funding? Additional questions include the following: Should the state allocate less towards other sectors such as defence and more towards health care, education, food and water? What would the court do if the state contends that resources not being used for education are being used for health care or other purposes such as realising economic growth?[186] It has been submitted that a court cannot weigh the competing demands for government resources to determine how much can be raised for the institutions, nor should it try to force the legislature to raise the necessary money regardless of competing considerations.[187] Socio-economic rights litigation is therefore viewed as entailing the review by the courts of government prioritisation, planning and resource allocation with implications for welfare, income and asset distribution and macro-economic conditions.[188]

Resolution of the above questions is the biggest hurdle faced by tribunals engaged in the enforcement of socio-economic rights both at the international and domestic levels. No substantial progress has thus far been made to devise standards that can be employed to measure the resources and to determine whether they are appropriate or are being employed effectively.[189]

However, as is demonstrated later in this section, the courts may seek counsel by requiring the state to discharge certain evidential burdens and to justify its use of resources. The courts then only would use a standard such as reasonableness to determine whether the state has made out a case to justify its use or non-use of the available resources. This approach saves the courts from being entangled in complex budgetary issues and answering the complex resource related questions as outlined above.[190] The problem with the reasonableness review approach is that there is no principle that establishes a mechanism for determining whether the resources allocated for a particular programme are reasonable in the circumstances. Neither has the Constitutional Court in its reasonableness review approach come up with any meaningful approach to determining whether reasonable measures are being undertaken to enhance the resources and whether the allocated resources are being used efficiently. According to Bilchitz,[191] the Constitutional Court's

186 Sunstein (n 123 above) 14.
187 E Frug 'The judicial power of the purse' (1978) *University of Pennsylvania Law Review* 715 787.
188 K Creamer 'The implications of socio-economic rights jurisprudence for government planning and budgeting: The case of children's socio-economic rights' (2004) 2 *Law, Democracy and Development* 222.
189 Robertson (n 180 above) 703. See ch two sec 2.2.4.
190 See Fredman (n 125 above) 176.
191 Bilchitz (n 81 above) 56A-10.

approach to the issue of resources can be summarised as follows: Firstly, the Court will focus its enquiry upon current allocations of resources within a particular department; secondly, the Court will more readily order allocations within existing budgets rather than require an increased budget in a particular area; and the Court will not readily accept a defence of lack of resources where the exclusion of individuals constitutes unlawful discrimination or a serious invasion of dignity.

Generally, the Constitutional Court has shown an inclination towards giving deference to the other organs of the state in cases involving allocation of resources. This is because the Court believes that resource allocation involves difficult decisions to be taken at the political level in deciding upon the priorities to be met. In the Court's opinion, a court should not interfere with resources allocation decisions taken in good faith by the political organs whose responsibility it is to deal with such matters.[192] The Court has been quick to assert that the socio-economic rights themselves are limited by a lack of resources and that the obligations imposed by them can only be analysed in the light of the resources allocated to those rights.[193] It is in light of this, and as can be deduced from the Constitution,[194] that the Constitutional Court is of the view that the reasonableness of the measures undertaken to realise the rights are governed by the available resources.[195] What is evidently lacking, however, is a clear definition of the relationship between resources and the reasonableness test. The Court leaves unanswered the question whether there is a need to analyse the reasonableness of the resources allocated to a specific programme and how this would be done. The closest that the Court has come to doing this is in the finding that a reasonable programme must 'ensure that the appropriate financial and human resources are available'.[196] What it does not do, however, is to set out clear guidelines for determining whether the resources allocated to the programme are themselves reasonable. In those cases where the state has argued that it does not have sufficient resources to realise the rights, the Court has declined to enquire whether there have been attempts on the part of the state to raise more resources. This has the potential of allowing the state

192 *Soobramoney* case (n 19 above) para 29.
193 *Soobramoney* case (n 19 above) para 11 and *Grootboom* case (n 16 above) para 46.
194 Secs 26(2) & 27(2).
195 *Grootboom case* (n 16 above) para 46. According to the Court, there could be circumstances in which the state may focus on the broader needs of society instead of the specific needs of particular individuals. Striking a balance between equally valid and competing claims, holds the Court, would not be considered a limitation of rights; instead, it amounts to defining the circumstances in which the rights may most fairly and effectively be enjoyed. See *Soobramoney* case (n 19 above) paras 31 & 54.
196 *Grootboom* case (n 16 above) para 39.

to withdraw from its responsibilities by allocating only minimal resources for the purposes of realising socio-economic rights.[197]

In the *Soobramoney* case, the Court did not question whether there had been any attempts on the part of the provincial authorities to solicit more funding to enhance the health budget. Instead, the Court hastily accepts that the 'Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public'.[198] In its opinion, to provide dialysis treatment to all those in need would require a dramatic increase of the health budget 'to the prejudice of other needs which the state has to meet'.[199] On this basis, the Court uses section 27(2) to justify the exclusion of the applicant from dialysis treatment. What the Court fails to do is to require the provincial authorities to prove that they are not only aware of their budgetary constraints, but that steps were being taken to alleviate them. It therefore is not surprising that approximately eight years after the judgment the state has not done much to boost the resources needed to take care of kidney patients at public hospitals. In August 2005, a newspaper report brought to light the acute nature of the problem of scarcity of dialysis machines at public hospitals. It reported that every week, public hospitals send away dozens of patients with kidney failure to die. One public hospital, Baragwanath, had about 150 people on dialysis, while some 5 000 patients required it.[200]

Requiring the state to demonstrate the steps it has undertaken to provide more resources would not amount to interfering in resource allocation matters. Instead, it would amount to imposing a burden on the state to demonstrate that it is doing whatever is reasonable to improve its resources directed at a specific programme. This is in addition to justifying the manner in which the resources already allocated to the programme are being used. As mentioned above, the concept of acting within the available resources imposes an obligation to take reasonable steps to solicit for more resources where the existing ones are inadequate and using the available resources efficiently. In light of this, it would not be overstepping the boundaries of the doctrine of separation of powers to adopt this approach. All that this approach requires is that an evidential burden be imposed on the state to justify the allocation of resources to a programme or policy.

Furthermore, it is only fair that the burden of proof in relation to resource allocation and use be placed on the state instead of requiring

197 See Pieterse (n 7 above) 91.
198 Para 24.
199 Para 28.
200 C Keeton 'Kidney patients are sent home to die' *Sunday Times* 28 August 2005 13.

the litigant to prove that the resources are inadequate or have not been employed properly. The state is in a better position to adduce evidence relating to the available resources and to show how they have been allocated.[201] The court, for instance, should be entitled to presume that any reduction in spending on a specific right is *prima facie* a violation. The burden then would be on the state to justify such reduction.[202] As has already been indicated above, this threshold of justification is also necessary in justifying failure to provide a minimum core on the ground of limited resources. The approach is also important because it enforces the value of accountability as a consideration in the application of the reasonableness test. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* (*Rail Commuters* case),[203] the Constitutional Court alluded to the importance of accountability in justifying resource allocations. The Court held that:

> [A]n organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resources, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision maker's authority to determine what are reasonable and appropriate measures in the overall context of activities.[204]

As stated by the Constitutional Court above, the approach I suggest here still leaves room for the state to carry out its resource allocation obligations without interference from the courts. The mandate to determine resources allocation would still vest in the state. All that the courts would demand is justification, which requires a clear indication of the basis upon which particular resources have been allocated and employed.

201 Liebenberg (n 36 above) 33-53-33-54.

202 The ESCR Committee has said that any retrogressive measures would need careful consideration and have to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources (General Comment No 3 para 9). In its concluding observations, after considering Canada's 3rd Periodic Report, the ESCR Committee raised concerns about cuts of 10% of social assistance rates for single people. The ESCR Committee said that these cuts appeared to have a significantly adverse impact on vulnerable groups and could increase homelessness and hunger. See Concluding Observations adopted by the UN Committee on Economic, Social and Cultural Rights at its 57th meeting (19th session) held on 4 December 1998, para 21 in L Holmström (ed) *Concluding observations of the UN ESCR Committee on Economic, Social and Cultural Rights: Eighth to Twenty-seventh sessions (1993-2000)* (2003) 97 101. See also Scott (n 48 above) 107.

203 2005 4 BCLR 301 (CC).

204 Para 88.

The problem with the Constitutional Court's approach in both the *Grootboom* and *TAC* cases is that it places on the applicant the burden to prove not only the unreasonableness of the measures undertaken, but also whether the state has acted within its available resources. Discharging this burden is 'a matter of great factual and legal complexity which will often be beyond the capacity of indigent and vulnerable groups'.[205] Moreover, this burden is made more onerous by the Court's failure to determine any meaningful standards of measuring the available resources and whether they have been employed effectively. It would only be fair and just if the presumptive standard employed by the ESR Committee in applying the minimum core obligations approach is employed here.[206] This standard could be extended not only to the examination of the nature of the available resources, but also to the manner of their employment.[207] It would be for the state to prove that it is employing the available resources efficiently. This is in addition to proving that it has undertaken reasonable measures to enhance its resources pool.

Recent jurisprudence from the Constitutional Court, in contrast to the *Soobramoney* case, shows a move towards demanding justification from the state regarding the way resources have been allocated. Although the *Khosa* case is distinguishable from other cases in the sense that it dealt with the exclusion from an existing service, the principles it enunciates could still be applied to other socio-economic rights cases not involving such exclusion. In this case, the Constitutional Court held that in constitutional cases, the burden was on the state to put all the necessary evidence before the Court. Moreover, this is imperative especially in cases in which court orders 'could have significant budgetary and administrative implications for the state'.[208] While the Court talks generally about evidence, one could interpret this to mean evidence on resources as well. This means that the state bears the burden of proof whenever it contends that it does not have enough resources or that it has used the available resources effectively.

One could stretch this further to mean that the state has a duty to convince the court why only so much has been spent and how providing a service would affect the state's budget negatively. All the court would do is to assess the evidence of the state and decide

205 Liebenberg (n 70 above) 23. Liebenberg (n 36 above) 33-53-33-54 contends that it would be unreasonable to expect ordinary litigants to identify and to quantify all the resources available to the state for the realisation of a particular socio-economic right.

206 General Comment No 3 para 10.

207 This presumption could be extended to other aspects of the reasonableness review approach as well. *Prima facie*, unreasonableness would be established when a litigant proves that he or she lacks access to social goods and services that are required for life sustenance. See Liebenberg (n 70 above) 23.

208 Para 19.

whether it was justified in limiting the existing service on the ground of resources. For instance, in the *Khosa* case, the Constitutional Court said that the exclusion of the applicants from the social assistance scheme on the grounds of lack of resources was not justified. This is because their inclusion would lead to a very small proportional increment, two percent, in the entire social grants budget.[209] As already mentioned, the Court based this conclusion on very scanty and speculative evidence adduced by the state on the impact that the inclusion of the applicants would have on the budget.[210] The state estimated that extending the benefits to qualifying permanent residents would lead to an increase of between R240 million and R672 million in the social assistance budget.[211] The Constitutional Court applied a proportionality test to conclude that the rights of the applicants were very important; such a minimal increment in the budget could not justify their exclusion. The Court also based its decision on the fact that there was an anticipated increment of expenditure on social grants by R18,4 billion over the next three years without making provision for permanent residents.

A similar approach was followed by the Canadian Supreme Court in *Eldridge and Others v British Columbia (Attorney General) and Others*.[212] This was a case of unfair discrimination brought by a deaf patient who contended that the failure of the province of British Columbia to provide interpretation services for deaf patients in public hospitals was discriminatory as it denied deaf patients access to health services. The Court rejected the defence of lack of resources because the proportional increment brought about by the provision of sign language interpretation to the entire health budget of the province was negligible: It was only 0,0025 percent.

It is important that the approach in the *Khosa* case be carried to future cases in which resources are implicated. There is no doubt that it is the state that controls all public resources and is in possession of all the information relating to their use. It, therefore, makes sense that the state be required to put information relating to the existing resources and their use before the courts. This makes the work of the courts much easier and, to a large extent, saves them from getting entangled in complex resource issues without adequate information.

209 Para 62.
210 Para 61.
211 Para 62.
212 [1997] 3 SCR 624, 151 D.L.R. (4th) 577.

All that the courts would have to do is demand justification from the state. In doing this, the courts would be guided by principles such as reasonableness, proportionality and the content of the rights.[213] This is in addition to the promotion of the constitutional values of accountability, openness and responsiveness.

3.3 Conclusion

This chapter has shown that, while the reasonableness review approach has the potential to lead to the realisation of socio-economic rights, it has a number of loopholes that have to be plugged. The court must appreciate the fact that resources play a role in determining whether the minimum core obligation has been discharged and provides the state with a possible defence. This, though, would shift the burden to the state to show that every effort is being made to provide for basic needs in the circumstances. This approach would compel the state to be more responsive to the needs of the poor, by directing resources to those living below the minimum core standard. It is true that the minimum core approach poses a danger of defining socio-economic rights rigidly and a-contextually, which means imposing rigid standards irrespective of the context. Nonetheless, this danger can be obviated by defining the minimum core using broad parameters which are then made applicable on a case-by-case basis. This is in addition to giving a margin of discretion to the state to choose the most effective means of realising the minimum core in each context.

The Constitutional Court's reasonableness review approach has also failed to give content to the rights, most especially as guaranteed by sections 26(1) and 27(1). Without any analysis of the content of the rights, the Court rushes to consider the obligation to take reasonable measures to progressively realise the rights within the available resources as stipulated in sections 26(2) and 27(2). This has left the beneficiaries of the rights without any clue as to the nature of the services to which they are entitled. Going by the approach of the Constitutional Court, all that the claimants can demand from the state is a reasonable programme undertaken within available resources to progressively realise the rights. This poses the danger of the reasonableness review approach degenerating into 'a weak and toothless standard'.[214] The Court's approach has also left it without any tools that could be used to interrogate the effectiveness of the

[213] This is consistent with the values of accountability, responsiveness and openness, as well as with the spirit of the Constitution as a bridge from a culture of authoritarianism to a culture of justification; a culture in which all exercise of public power has to be justified. See Mureinik (n 128 above).

[214] S Liebenberg 'Making a pro-poor Constitution' *Mail & Guardian* 12-18 May 2006 26.

means that have been chosen to realise the rights. The means cannot be assessed without an understanding of the goal to be realised, which is the content of the rights. It is only when the Court has given content to the rights that it will then be able to subject the state's measures to a proportionality and rational connection test as suggested in this chapter.[215]

This chapter has also shown how useful a proportionality test, similar to the one applied under the general limitation clause, can be to socio-economic rights litigation. In socio-economic rights litigation, courts would have to weigh up the competing interests as brought to the fore by the state's assertions that providing a particular service would prejudice certain legitimate interests. This is in addition to questioning whether there is a rational connection between the means chosen by the state to realise the rights and the goal to be realised. The courts would also have to be convinced that there are no less damaging means by which the rights could have been limited. This approach imposes a higher burden of justification on the state and puts the government under pressure to adopt the most appropriate means of realising the rights in each case. It is only such an approach that can translate socio-economic rights from mere abstract paper rights to concrete rights capable of improving the conditions of the vulnerable. This approach will compel the courts to reflect on their remedial approach and to grant those remedies that guarantee the concrete nature of the rights. The adoption of this approach does not suggest in any manner that the court is being disrespectful to the elected branches of the state; rather, it reinforces the constitutional values of accountability, responsiveness and openness.

A similar standard of justification would be used to enable the courts to effectively interrogate the reasonableness of the resources allocated to the realisation of socio-economic rights. At the moment, the Constitutional Court's approach to the issue of resources is still deficient. The Court has mostly deferred to the state to decide the most appropriate way of using resources. However, while courts cannot assume the role of appropriating budgets and resources, they may require the state to justify its budgetary allocations.[216] A burden would be imposed on the state to prove not only that its resources are limited, but also that the existing resources have been applied appropriately.[217] In certain circumstances, the state would have to

[215] Sec 4.2.3.2 above.

[216] Fredman (n 25 above) 182 has argued that the existence of a right does not mean that courts need to make primary decisions about the allocation of resources; instead, it requires the courts to insist that decision makers take responsibility for the decisions 'by providing open, transparent, and reasonable reasons, based on proper evidence rather than generalisation or assumptions'.

[217] See Russell (n 40 above) 16.

justify its failure to allocate more resources towards realisation of the rights or its failure to appropriate monies towards a commissioned programme. This approach places the duty of justification on the state and gives the courts an entry point to determine whether the state has indeed justified its actions with regard to resources. If not satisfied, the courts will be able to grant relief which compels the state either to allocate more resources towards realisation of the rights or to use the available resources more efficiently. The *Khosa* case provides an indication of the Constitutional Court's preparedness to move in this direction, but it remains to be seen how the Court is going to apply the *Khosa* approach in future cases.

This chapter has discussed the Constitutional Court's approach to the primary theory, which is the nature of the obligations engendered by socio-economic rights. It is now safe to move to the secondary theory, which is the nature of the remedies that may be provided by violation of socio-economic rights. The discussion of the approach of the Court in this respect, however, will be guided by two theories: corrective and distributive justice. These two theories of justice have had a very big impact on the nature of judicial remedies in the areas of both public and private law. The theories are discussed in the next chapter.

CHAPTER 4 RECONCILING CORRECTIVE AND DISTRIBUTIVE FORMS OF JUSTICE AND THEIR IMPACT ON REMEDY SELECTION

4.1 Introduction

Chapters two and three have demonstrated that in construing the obligations engendered by the socio-economic rights in the South African Constitution, the Constitutional Court has, among others, been influenced first by the doctrine of separation of powers. Secondly, the Court has been influenced by concerns regarding its institutional competence to adjudicate social justice matters and to consider issues related to resource allocation. In addition to the above considerations, however, the Court has also implicitly been influenced by the form of justice that it is inclined toward. This has greatly impacted on the kinds of remedies that the Court has granted which, by their nature, have guaranteed socio-economic rights as collective rather than individual rights. This is because the Court is inclined toward distributive justice as opposed to corrective justice.

The purpose of this chapter is to set out a theoretical platform for an understanding of how different notions of justice influence the remedies that courts grant. The two theories of justice to be discussed here derive from the philosophies of corrective and distributive forms of justice. 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 position they would have been in had the violation not occurred. The distributive justice philosophy does not 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 the violation if this would have a negative impact on other legitimate interests.[1]

[1] K Roach 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* 859 859.

These theories of justice influence a host of other factors, such as the relationship attached to rights and remedies, the form and procedures of litigation, and the manner of implementing the remedies. They also influence the liability rules adopted by the courts to determine whether or not there is a wrong and whether the plaintiff has suffered as a result. Additionally, the liability rules are used to identify the wrongdoer and the extent of his or her remedial obligations. All these factors have a bearing on the kinds of remedies that a court may grant. Traditionally, damages and restitution as used (especially in private law) have strong roots in the corrective justice philosophy. The main objective of damages, pecuniary damages in particular, is to restore the position of the victim. The court strives as much as possible to compensate the victim for the harm that was brought upon him or her as a result of the violation. In contrast, injunctive relief has played a dual role by serving the objects of both corrective and distributive forms of justice. It is in the area of using injunctive relief that the distinction between corrective and distributive justice is most visible. On the one hand, courts dispensing distributive justice, unlike those dispensing corrective justice, have embraced the injunction as a tool of eliminating systemic violations and have used it without much restraint. On the other hand, the corrective justice philosophy does not consider the injunction as a remedy of first resort. It is only used where damages are considered inadequate because of the irreparable nature of the harm caused.

The impact of the theories of justice is also felt when one explores the relationship between rights and remedies. This chapter therefore discusses this relationship and its impact on the remedy selection process. The chapter sets a theoretical framework for discussion in chapter five of the South African courts' approach to granting remedies. Chapter five analyses the impact that the notions of both corrective and distributive justice have had on the South African Courts. As already mentioned, the Constitutional Court, for instance, has its inclination toward the distributive justice theory as seen through its definition of an 'appropriate, just and equitable relief'. The Court has chosen to be guided by the ethos of distributive justice and has on occasion treated rights and remedies as two different phenomena.[2]

[2] See ch five sec 5.3.

4.2 Corrective and distributive forms of justice distinguished

4.2.1 The ethos of corrective justice

The traditional conception of litigation as guided by corrective justice reflects the nineteenth century vision of society, which promoted the individual as an autonomous entity.[3] The corrective justice theory is also guided by the vision of libertarianism. It is this vision that distinguishes corrective justice from distributive justice. Libertarians are of the view that each person has the right to live his or her life in any way he or she chooses, so long as that person respects the equal rights of others. The government exists only to protect people from the use of force by others.[4] From this perspective, individual freedom cannot be sacrificed for the sake of the common good as each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. It is for this reason that justice denies that the loss of freedom for some is made right by a greater good shared by others.[5]

In terms of this view, the primary function of the court is resolution of disputes in order to achieve fair results from human interaction and to maintain individual autonomy.[6] Libertarians define human rights in a negative manner; all that people need are those rights that guarantee non-interference from others in their enterprise of seeking autonomy.[7] In terms of this philosophy, 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 the distribution of property gained through individual efforts. It therefore rejects the welfare state in favour of a liberal non-intervention state that respects people's property rights.[8] The notion of corrective justice is designed to achieve these objectives.

The philosophy of corrective justice recognises the fact that stopping legal wrongs completely is impossible. It, however,

3 A Chayes 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* 1281 1285.

4 D Boaz 'The coming of libertarian age' (1997) 19 *CATO Policy Report*, sourced at http://www.heartland.org/pdf/63011a.pdf (accessed 25 June 2006).

5 M Sandel *Liberalism and the limits of justice* (1998) 16. See also J Rawls *A theory of justice* (1999) 3.

6 Chayes (n 3 above) 1285.

7 J Garret *The limits of libertarianism and the promise of a qualified care ethic* (2004), sourced at http://www.wku.edu/~jan.garrett/ethics/libcrit.htm (accessed 25 June 2006).

8 See C Wellman 'Justice' in L Simon (ed) *The Blackwell guide to social and political philosophy* (2002) 70. See also generally A Ryan 'Liberalism' in E Goodin & P Pettit (eds) *A companion to contemporary political philosophy* (1995) 291.

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.[9] Aristotle defined corrective justice as 'that which plays a rectifying role in a transaction between man and man'.[10] Aristotle favoured corrective above distributive justice; he contended that judges must posses the moral virtue of corrective justice and the intellectual virtue of practical wisdom in order to determine the just result in all cases.[11] Corrective justice has also been described as compensatory justice and associated with three essential features: (1) the parties are treated as equal; (2) there must be damage inflicted by one party on another; and (3) the remedy granted must seek to restore the victim to the condition he or she was in before the violation.[12] Once a violation is proven, the judge has to insist on full correction without attempting 'either to balance the affected interests or changing … behaviour in the future';[13] the judge will focus on restoration of the *status quo*.

In modern private law, corrective justice is not only most prominent in tort (delict) law, but obtains also in property and contract law.[14] When parties enter into a contract, it is assumed that they begin as equals who assume corresponding rights and duties. Omissions by one party to discharge his or her duties, for example by not paying the price or delivering the goods, destabilises 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 destabilisation of the parties' equality. The purpose of the law in this case becomes

9 K Roach *Constitutional remedies in Canada* (1994) 3-17 describes corrective justice as a powerful remedial theory which demands that wrongs be corrected. Though it empowers the courts to correct the wrong, the remedies are limited to the harm that a wrongdoer has caused (3-18).

10 V Aristotle *Nicomachean ethics* 2, as quoted by M Modak-Truran 'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law and Humanities* 249 250. See also Roach (n 9 above) 3-17. Aristotle distinguished corrective justice from distributive justice when he said that distributive justice is that 'which is manifested in distributions of honour or money or other things that fall to be divided among those who have a share in the constitution'.

11 See Modak (n 10 above) 250.

12 D Shelton *Remedies in international human rights law* (1999) 38. Shelton contends that in all legal systems, the principle that a wrongdoer has an obligation to make good the injury caused is prominently enforced, together with the restitution of property wrongly taken (60).

13 Roach (n 9 above) 3-2. He contends further that, if a court focuses on correcting harms caused by a proven violation, it will not have to worry about infringing the role of other branches of government to pursue distributive justice. This means that corrective justice is intrusive in nature as it looks at the outcome of the case and its impact from the perspective of the plaintiff.

14 See C 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, sourced at SSRN http://ssrn.com/abstract=669504 (accessed 22 June 2006).

one of restoring this equality.[15] The same equality could be assumed with respect to 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 had not been committed. According to Aristotle, corrective justice 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: 'This kind of injustice being an inequality, the judge tries to equalise it.'[16]

The purpose of the law, from the above 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 this *status quo*. It is for this reason that corrective justice has been described as backward looking: It tends to focus backwards on the particular events that affected a particular individual.[17] Corrective justice is best suited for the rectification of discrete harms suffered by an individual at the hands of a clearly identifiable defendant.[18] 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; liability on the part of the defendant must be established. The question posed by corrective justice therefore is whether the plaintiff has suffered an injustice at the hands of the defendant.[19]

A judge is required to look only at the distinctive character of the injury rather than at the virtue of the parties and must determine which party inflicted the injury and which party received it.[20] Corrective justice is therefore not concerned with the character of the parties. According to Aristotle, an injury is an injury: 'It makes no

15 E Weinrib 'Corrective justice in a nutshell' (2002) 52 *University of Toronto Law Journal*, sourced at http://www.utpjournals.com/product/utlj/524/524_weinrib.html (accessed 22 June 2006). See also Modak (n 10 above) 252.

16 Aristotle, as quoted by Modak (n 10 above) 256. 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, and 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.

17 K Cooper-Stephenson *'Principle and pragmatism in the law of remedies'* in J Berryman (ed) *Remedies, issues and perspectives* (1991) 21.

18 Roach (n 9 above) 3. See also K Roach 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* 865 868 872.

19 E Weinrib 'Restitutionary damages as corrective justice' (2000) 1 *Theoretical Inquiries in Law* 3, sourced at http://www.bepress.com/til/voll/iss1/art1 (accessed 24 June 2006).

20 Modak (n 10 above) 252.

difference whether a good man has defrauded a bad man or a bad man a good one.'[21] As long as fault is established, for instance, it does not matter whether the defendant is a government or a private individual. However, as is submitted later, the character of the defendant cannot be ignored and brushed aside as it may determine the potential remedies available.[22]

The discretionary space of a judge under corrective justice is very limited; the judge has to live up to the demands of causation and restoration.[23] In remedial terms, the catalogue of remedies from which the judge can choose is also very limited. He or she is limited to those remedies that, as much as possible, restore victims to their previous position. The court focuses on establishing liability which must be linked to the wrongful conduct of the defendant as guided by the principles of liability and causation.[24] The wrong is an essential element because it is the right-infringing wrong which forms the subject of the claim.[25] It is unjust for a defendant to be required to remedy that for which fault has not been proven on their part, and yet if fault is proven, it is unjust if the victim is not restored to the position he or she was in before the wrong. 'The idea here seems to be that harm occasioned by a blameless human agency is morally equivalent to those caused by natural forces.'[26] Shelton submits that, otherwise, a person's loss due to a falling tree would be legally equivalent to injury resulting from torture and that even rights violating conduct which causes no compensable harm or that brings an economic benefit to the victim would be a cause of complaint.[27]

Corrective justice is also not concerned with the impact that its remedies may impose, not only on the defendant, but also on third parties. All that the court focuses on are 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 that:

> I recognise that the enforced retirement of the appellants was not motivated by unconstitutional *animus* but rather by the severe fiscal

21 Aristotle, as quoted by Modak (n 10 above) 257.
22 Cooper-Stephenson (n 17 above) 12. Cooper-Stephenson gives the example of an errant quasi-judicial tribunal as requiring an order of hearing or *mandamus* and not an award of damages.
23 Roach (n 18 above) 859.
24 Roach (n 9 above) 3-17.
25 Shelton (n 12 above) 39.
26 G Keating 'Distributive and corrective justice in tort law of accidents' (2000) 74 *Southern California Law Review* 193 198.
27 Shelton (n 12 above) 39.
28 (1990) 76 DLR (4th) 545, [1990] 3 SCR 229.

> 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 illustrated later,[30] the majority disagreed, taking into consideration the financial impact that compensation would have on the university. The Court held that, in addition to the interests of the aggrieved staff, the interest that the public has in the operation of universities had to be considered.

Corrective justice and traditional litigation processes

Corrective justice has played a very 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 were 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 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 using very strict rules of standing — the plaintiff must establish his or her standing by proving that he or she had a right whose enjoyment 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.

---

29 See case at http://scc.lexum.umontreal.ca/en/1990/1990rcs3-229/1990rcs3-229.html (accessed 18 September 2006).
30 Sec 4.2.2 below.
31 See generally P Sturm 'A normative theory of public law remedies' (1991) 79 *George Town Law Journal* 1355 1360.
32 Sturm (n 31 above) 1383.
33 Chayes (n 3 above) 1283.

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.[34] 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 a collection of identifiable individuals who have the same interests and have suffered the same harm at the hands of the same defendant.[35]

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.[36] 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 rights and remedies; 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 organisational behaviour. This is because of the complexities of proving causal responsibility for the harms that are caused by such violations.[37] Systemic violations are those violations that establish themselves and endure in a sustained manner as part of an institution's behaviour. Most times the violation may not be the product of actions of identifiable officials, instead it may arise from a web of institutional

34 Chayes (n 3 above) 1291. Chayes also perceives the class suit as a response to the proliferation of more or less well-organised groups in society and also as a result of perception of some interests as group interests.

35 The class action has come under increasing scrutiny, especially in the United States of America, where it has mostly been used. In most cases, it has been used not as a vehicle of justice, but as a means of making huge sums in legal fees for lawyers representing a wide range of victims. Class actions have also been criticised in the United States for straining judicial resources, especially in localised areas where class suits are mostly filed in search of sympathetic juries. These suits also allow cases that raise interstate issues to be conducted outside the jurisdiction of federal courts. It is because of these and other reasons that the United States Congress in 2005 passed the Class Action Fairness Act, an Act which redefines the jurisdiction of the federal and state courts in class actions.

36 T Eisenberg & T Yeazell 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* 465 474.

37 Roach (n 18 above) 865. Roach contends that the causal requirement encourages a lack of candour and forces plaintiffs and defendants to make moralistic bluffs that do not capture the complex and ambiguous nature of the structural problem to be remedied (875).

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 to tackle. However, this does not mean that corrective justice should be discarded completely where violations result from organisational 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.[38]

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.'[39] With this model of justice, there is a fusion of rights and remedies as the purpose of the latter is to realise the former. A remedy is not suited for 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 realisation of the rights. It is this difference between corrective and distributive justice that runs through the debate on the relationship between rights and remedies.

4.2.2 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 relevant benefits and shoulder the relevant burdens.[40] The benefits may come to such members either 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 also lays emphasis on the common good of society and

38 Roach (n 18 above) 870.
39 Roach (n 18 above) 861.
40 See Aristotle (n 10 above).
41 D Klimchuk 'On the autonomy of corrective justice' (2003) 23 *Oxford Journal of Legal Studies* 50.

the wellbeing of all its members. An act is just only if it maximises the wellbeing of everyone else.[42]

From a utilitarian perspective, the law and the courts have very important roles to play in the enterprise of realising social co-operation. 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 maximise overall happiness and wellbeing.[43] It is this form of justice that persons such as Jeremy Bentham and John Stuart sought to entrench in England in the nineteenth century. They viewed the laws that existed then as morally atrocious because they prevented rather than promoted overall happiness.[44] Utilitarianism also represents itself in the form of what has been described as communitarianism, a concept which challenges libertarianism on the grounds that an individual is not an end, but exists together with others with whom he or she pursues a common end.[45] Communitarians submit that an ideal society is one that defines the individual in terms of what they are and the values that they have.[46]

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.[47] 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.[48] 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.[49] While corrective justice

42 See P Vallentyne *Distributive justice*, sourced at http://www.missouri.edu/~klinechair/on-line%20papers/distributive%20justice%20(handbook).doc (accessed 24 June 2006). See also J Rawls *Political liberalism* (1993) 16; and S Scheffler 'Rawls and utilitarianism' in S Freeman (ed) *The Cambridge companion to Rawls* (2003) 426.

43 Wellman (n 8 above) 60.

44 Wellman (n 8 above) 61.

45 See S Mulhall & A Swift *Liberals and communitarians* (1996) 10. See also generally W Kymlicka 'Community' in E Goodin & P Pettit (eds) *A companion to contemporary political philosophy* (1995) 366; and M Scanlon *What we owe each other* (2000).

46 Mulhall & Swift (n 45 above) 13.

47 Sandel (n 5 above) 16.

48 Cooper-Stephenson (n 17 above) 19.

49 Cooper-Stephenson (n 17 above) 19 submits that it has also arisen from the increased focus which is being given to the deterrent effect of remedies, which requires consideration of the interests of the future community of persons who will find themselves in a like situation as the plaintiff and defendant.

seeks to explain why '*this* defendant is liable to *this* plaintiff',[50] distributive justice focuses on the broader societal interests.[51]

Distributive justice is based on an acknowledgment 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.[52] Harm may be inflicted on groups of people, and not only 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 liability in the case at hand. Without asking whether or not government is guilty, the court could, in some circumstances, dedicate its efforts to getting solutions that may do away with the harm. In this context, therefore, the liability rules of corrective justice will be of very limited application.

The remedies arising from the administration of distributive justice have their roots in the law of equity, whose application began in England as a response to the inadequacies of the common law in remedying certain violations. The common law has historically been a very rigid body of law. It has recognised only specific causes of action through the writ system and granted very rigid remedies to fit the specific writ. What equity has done is to introduce a sense of flexibility into the law and to soften the common law and make it fairer.[53] 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.[54] This is in addition to affirming the judge's broad and flexible remedial discretion.[55] This balancing and wide discretion has allowed courts to award remedies

50 L Smith 'Restitution: The heart of corrective justice' (2001) 79 *Texas Law Review* 216.

51 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, and it is not true that the question of what alternatives are available for a problem are deterred by this approach. See D Horowitz *The courts and social policy* (1977) 34.

52 Roach (n 9 above) 3-19.

53 J Berryman *The law of equitable remedies* (2000) 2.

54 See Chayes (n 3 above) 1292-1293.

55 Roach (n 18 above) 887.

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'.[56] 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. While equity is not explicitly part of South African law, its principles are implicitly enforced by the courts through such principles as those that require fairness.

Unlike the case with corrective justice, a judge dispensing distributive justice will therefore rely on the breadth and flexibility of the equitable remedial powers without careful attention to the demands of causation and restoration.[57] 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. Courts, for instance, are not bound by the requirement that equitable remedies will only be available where common law remedies are proven to be inadequate. This has enabled the courts to embrace the full breadth of equity and its benefits; it may be applied in adjusting and reconciling competing claims and to enable the court go beyond the matters immediately underlying its jurisdiction and grant whatever other relief may be necessary under the circumstances.[58]

Unlike corrective justice, distributive justice does not emphasise 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 current legal problems. Legal problems and disputes are no longer bilateral. The world we live in now has complex and interdependent interests, a reality which the courts must acknowledge when they choose remedies.[59] All the interests

56 Roach (n 18 above) 860. Roach submits that the flexibility of equity provides judges with an opportunity to address the present needs of plaintiffs and defendants without concentrating on their past rights and wrongs as corrective justice requires. In his opinion, courts have generally been reluctant to use the language of needs to justify 'enriched' remedies, but they have used it to recognise the necessity of granting delayed and imperfect remedies. Roach submits further that the displacement of the dominance of the corrective theory will encourage courts to develop remedies tied to victims' needs as a counterbalance to the inevitability that remedies cannot fully correct structural wrongs but will often recognise society's needs for delayed or imperfect remedies (864).

57 Roach (n 18 above) 859.

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

59 Roach (n 9 above) 3-19.

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 focus on the future and 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 in order to address past wrongs. 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.[60] In this setting, the role of the court is not to determine where fault lies; it is to develop a plan that fairly and effectively realises the rights not only at the time of the case but in future as well.[61] The court will identify the needs that have to be addressed, and 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.[62]

The remedy guaranteed will not necessarily be one that flows from the wrong. It must be a remedy that satisfies all the interests concerned. The emphasis is not on correction of the wrong; complete correction may be ignored for the sake of addressing other interests. Both corrective and distributive forms of justice demand that where a state agency 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'.[63] '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.[64] 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. This is because once a violation has been found, remedial options should not be constrained by the corrective requirements of causation and restoration as all of

60 See Chayes (n 3 above) 1294.
61 Sturm (n 31 above) 1393.
62 Roach (n 18 above) 864.
63 M Wells & T Eaton *Constitutional remedies: A reference book for the United States Constitution* (2002) xxv.
64 Wells & Eaton (n 53 above) xxv give the example of an injunction that would be especially disruptive to legitimate state goals as in the case of an employee who is fired and whose reinstatement would produce turmoil in the office. The injunction would be denied in that case.

the victim's needs should be considered in the practical balancing of interests that equity demands.[65]

The approach described above requires the court to consider the costs and benefits of a particular remedy. For instance, as seen in chapter five,[66] damages in socio-economic rights litigation deplete the already limited state resources, which may affect the state's capacity to deliver socio-economic goods and services. In the Canadian case of *McKinney*, for example, the majority thought that requiring the university to stick to the statutory state retirement age requirements and paying compensatory damages would adversely affect the university's already strapped finances and would impact on the public interest. The Court held that, 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. According to the Court, the need to preserve access to the valuable research and other facilities of universities had to be considered. 'Against the detriment to those affected must be weighed the benefit of the universities' policies to society.'[67]

It should be noted that the various remedies come with a number of costs, not only financial, but such other costs as forbearance of benefits, 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.[68] While a court's approach in granting remedies may be intended to realise the full protection of the infringed rights, it may come with unreasonable costs on the part of the defendant. This is in addition to imposing burdens on third parties not before the court. Though the grant of remedies should not be deterred on the ground that they impose burdens on the defendant,

65 Roach (n 18 above) 864.
66 Sec 5.3.2.
67 See case at http://scc.lexum.umontreal.ca/en/1990/1990rcs3-229/1990rcs3-229.html (accessed 18 September 2006).
68 Shelton (n 12 above) 54; Cooper-Stephenson (n 17 above) 36.

these burdens cannot be ignored as they may affect the effectiveness of the remedy itself.[69] 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.[70] The courts should, however, be careful not to impose on such third parties costs which may be viewed as unjust or unduly burdensome.[71] 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, as discussed in chapter two.[72]

Consideration of the costs of the remedies is the essence of the notion of 'remedial cost internalisation'. According to this notion, the remedy should limit the autonomy and choices of as few innocent individuals and institutions as possible.[73] The risk of non-compliance with the remedy should itself be weighed as a cost that needs to be traded off against the effectiveness of the remedy.[74] A less effective remedy may be selected where a more effective one heightens the risk of non-compliance. Gewirtz, for instance, contends that the intellectual and practical problem posed in each situation is whether and how the law should adjust its remedial aspiration in the face of a resistant reality. In his opinion, it may at first for instance seem wholly illegitimate for courts to take account of resistance, since

69 In the Canadian case of *Lavoie v Nova Scotia (Attorney-General)* (*Lavioe* case) 47 D.L.R (4th) 586; 1988 D.L.R LEXIS 1108 the Court declined to make an order that the defendant establish facilities for francophone students. The Court said that it would not make such order until it was satisfied that the number of enrolled students was sufficient to justify the cost. The Court observed that the defendant's interests in terms of costs had to be considered as well; because to put the defendants by order court to the expense of providing a separate facility for say, 200 plus children from Grades P to VIII, and then to find only 50 actually enrolled is an order that the Court was not prepared to make on the evidence before it (47 D.L.R. (4th) 586, at 594). It has been submitted that the burden is on the defendant to persuade the court that the remedy is unreasonable and imposes undue hardship. Roach: 1994, at 13-50. This does not mean though that the court cannot detect the hardships on its own, and it is even more necessary for the court to do so in respect of costs on third parties who may even not be before the court.

70 Shelton: 1999, at 54.

71 In this regard, the courts have been urged to try to limit the consequences of decisions on persons or processes extraneous to the litigation to a minimum. M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 [Hereinafter Pieterse: 2004], at 412.

72 Section 2.3. See J Cassels 'An inconvenient balance: The injunction as a Charter remedy' in J Berryman (ed.) *Remedies, issues and perspectives* (1991) Thomson Professional Publishing Canada 272 [Hereinafter Cassels: 1991], at 300 – 303, and also Pieterse: 2004, at 412

73 Cooper-Stephenson: 1991, at 36.

74 I Currie and J De Waal *The Bill of Rights handbook* (2005) Juta & Co [Hereinafter Currie & De Waal: 2005], at 198. Currie & De Waal contend that it would be unrealistic for a court not to take the possibility of the unsuccessful execution of its order into account when considering the appropriateness of a remedy.

doing so appears to deny the very right that the court has affirmed, yet in reality resistance cannot be ignored.[75]

The resistance encountered in the implementation of judicial decrees in the United States school desegregation cases supports the above submission. 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*.[76] 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 sections 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 and incitement, and foot-dragging by public officials.[77] In fact, in some cases the federal government had to enlist the services of the US marshals to ensure that black learners are enrolled in educational institutions. This impacted greatly on the remedies and the means of enforcement chosen by the courts to vindicate the right to equality. Some of the remedies and means of implementation did not present themselves as the most effective available; they seemed minimalist in objective. In some cases it was feared that immediate implementation of the court decrees would have exacerbated the resistance.[78] All that the courts did at the beginning was to demand that the states desegregate the schools with all deliberate speed. It was only after resistance had been overcome 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 considers 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.[79] A remedy may be ignored simply because it is impossible to carry out, with the resultant effect that the ideal it protects is hypothesised as unrealistic. It is important to note

75 P Gewirtz 'Remedies and resistance' (1983) 92 *Yale Law Journal* 588.
76 349 US 294 (1955) (*Brown* case).
77 Gewirtz (n 75 above) 589.
78 Shelton (n 12 above) 54. See also D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 322.
79 Cooper-Stephenson (n 17 above) 32.

that competing interests that are considered insufficient to override the purposes of the rights at the rights determination stage could be relevant and used at the remedial stage to limit the scope of the remedy. It is therefore not correct, as has been contended,[80] that an effective remedy is one that is capable of having an immediate effect.

In the 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 a means of countering the resistance.[81] 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.[82]

Horowitz has condemned this approach as a dubious assumption that the litigants before the court typify a bigger problem. In his opinion, what this signifies is the increasing subordination of the individual case in judicial policy making, which has led to the individual fading away into the background. This has resulted in less care being devoted by the lawyers and the judge to the appropriateness of particular plaintiffs and to the details of the grievance.[83] He describes the new judicial approach as a process that has superimposed itself on the judicial structure that evolved primarily to decide individual cases. This submission, however, ignores the reality that the individual is part of a bigger society.

Focus on character of violator under distributive justice

With distributive justice, the court does not focus solely on the nature of the injury, but also on the distinctive character of the parties in the court case. This is in addition to focusing on the character of persons that may not necessarily be parties in the case yet would be affected

80 See M Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215 217.

81 Cooper-Stephenson (n 17 above) 38 has submitted that the argument may be made that the highly-prized human rights might be reformulated in the face of defendant recalcitrance. He submits that whether a 'rights maximising' approach to remedies, or an 'interest balancing' approach is used, the courts must recognise that resistance can weaken victims' rights and consider strong measures to defeat that resistance. They must sometimes limit remedies in light of resistance because to do so ultimately provides the most effective remedy. It may indeed maximise the plaintiff's rights in the long term to interest balance in the short term, and a court should be candid when that is done.

82 Roach (n 18 above) 882. See also Special Project 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* 784.

83 Horowitz (n 51 above) 7 9.

by its results. Those before the court are therefore considered images of sociological entities, which, though composed of individuals and must be represented by particular individuals, are not reducible to the people who speak for them.[84] Focusing on the nature of the wrong while ignoring the character of the violator has serious implications, especially where government is implicated as the wrongdoer. The character of the violator is relevant to a determination of how to apply the constitution; it may also influence the efficacy or availability of certain remedies.[85]

Though they may inflict the same kind of harm, violations perpetrated by private individuals and those perpetrated by government are generally of a differentiated nature.[86] The reasons that lead to such violations are usually also quite different; so are the benefits that may be obtained by the violator. According to Schucks, in respect of public officials 'the returns for accepting risk are far more intangible and remote than the potential returns that motivate private risk taking'.[87] It therefore makes sense to identify the violator because the motive of the violator, if deterrence is to be achieved, becomes a relevant consideration. A violator who perceives his or her motive to be legitimate may not be deterred by certain remedies, or may continue the violation if he or she values the benefits of the violation highly. Cooper-Stephenson describes the process of considering the character of the defendant as 'remedial targeting', which involves an analysis of the types of official misconduct.[88] The nature of the remedies needed to deter violations by the state may be different from those that deter private violations.[89] Damages may be effective in respect of private wrongdoers because of the dent

84 Cooper-Stephenson (n 17 above) 20.

85 I Currie & J de Waal *The Bill of Rights handbook* (2005) 192. Currie & De Waal argue that the deterrent effect of some remedies may differ considerably depending on whether the violator is a public or private institution. They also argue that when an institution is responsible for the violation, it may be possible to remit a decision for reconsideration; this is not possible where the violator is an individual (197).

86 Pilkington has argued that one acting in the name of the government has the potential ability to bring about substantially greater harm than the ordinary person. M Pilkington 'Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms' (1984) *Canadian Bar Review* 517 536.

87 P Schuck *Suing government: Citizen remedies for official wrongs* (1983) 16-25, as reviewed by C Sunstein 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* 749 751. It is for this reason that Schuck thinks that damages may not be an effective means of deterring public officials from violating rights.

88 Cooper-Stephenson (n 17 above) 12.

89 Shelton (n 12 above) 51.

they make on private funds. Yet damages against government, paid from public coffers, may be an ineffective deterrence measure.[90]

Government is perceived as the guardian of human rights and the protector of all citizens; violations by this institution go to the very root of protection and need to be dealt with severely.[91] At the same time, one must consider the motives behind violations of human rights. In most cases, private wrongdoers are motivated by selfish interests such as accumulation of wealth and amassing power.[92] In contrast, violations by government may arise out of sheer negligence on the part of public officials, and sometimes in the belief that the public interest is being served.[93] Violations by government could also result from failure of comprehension, failure of motivation or systemic failure.[94] Yet remedies that work for a government that is merely inattentive to constitutional standards may not work for a government that is either incompetent or intransigent. The latter may call for strong remedies, including contempt of court sanctions, if necessary.[95]

The identification of the character of the violator in the case of government defendants is also important because it allows the court to ascertain the specific government entity bearing the remedial obligation. This is particularly relevant within the context of the semi-federal structure of the South African government. The Constitution designates the Republic of South Africa as consisting of the national, provincial and local government spheres which are distinct but also interdependent and interrelated.[96] Through this structure, the Constitution has imposed different socio-economic rights obligations on different levels of government. It is important that any remedy to redress violations of these rights be directed at the level of

90 As above. Damages are not effective against government because they must be substantial enough for a dent to be felt and to prevent government from purchasing an option to continue violating human rights. Yet substantial damages may have an impact on the government's capacity to discharge all its constitutional commitments as they deplete the resources needed for this purpose. See *Fose v Minister of Safety and Security* (*Fose* case) 1997 7 BCLR 851 (CC) para 72.

91 Shelton (n 12 above) 50. He submits that the remedies afforded should reflect the breach of trust involved; the more outrageous the wrongdoer's conduct, the more outraged and distressed the victim will be, and the harm that will be suffered.

92 This is not to suggest that all private violations are motivated by a desire for wealth and power; some result from sheer negligence, while others may be committed in good faith because of ignorance.

93 Again, this is not to suggest that there are no cases where public officials are motivated by personal and selfish interests or even by the need to satisfy political needs.

94 These are the reasons that have been identified by Schuck as explaining the motives behind the commission of wrongs by government. See Schuck (n 87 above) as referred to by Cooper-Stephenson (n 17 above) 14-18.

95 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 325 345.

96 See secs 40 & 41.

government that bears the obligation that has been violated. This is not possible where the court ignores the character of the defendant and the nature of the obligations of that defendant.

4.3 Relationship between rights and remedies

The relationship of rights and remedies has been the subject of controversy between scholars for quite some time. While some scholars believe that rights and remedies are interlinked, others insist that the two should be de-linked and considered separately. It is worthwhile exploring this debate because of its impact on the kinds of remedies that a court may grant and its relationship with the ethos of justice. The relationship that different scholars ascribe to rights and remedies has, amongst others, been determined by the notion of justice to which they subscribe. Linkage between rights and remedies makes sense from the perspective of the theory of corrective justice. This is because remedies under this theory of justice are supposed to restore the right in its entirety.

A judge who believes in the linkage between rights and remedies will therefore restrict himself or herself to those remedies that maximise the right and will not pay attention to considerations not connected to the right, even if these impact on the implementation of the remedy. This is the basis of the theory that the only reason remedies exist is to serve to implement substantive rights, and that the remedy should, as far as possible, serve to vindicate the right in issue.[97] This approach is in accordance with the concept of rights maximisation which requires that the only question that a court asks after finding that there is a violation is one of which remedies will be most effective to the victims.[98] Considerations such as the costs of the remedy, unless they impact on the effectiveness of the remedy, are irrelevant.

Distributive justice, on the other hand, supports the de-linking of right and remedy. This is because this form of justice allows judges, when choosing a remedy, to take into account factors that may not necessarily relate to the nature or objects of the rights. This view is supported by a number of scholars.[99] It is contended by some scholars that rights are idealistic and can exist on their own. However, they need to be transformed into reality by the use of remedies. It is for this reason that Fiss submits that rights and remedies are but two

97 Cooper-Stephenson (n 17 above) 5.
98 See generally Gewirtz (n 75 above).
99 See O Fiss 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1; F Sager 'Fair measure: The legal status of underenforced constitutional norms' (1978) 91 *Harvard Law Review* 1212; D Walker *The law of civil remedies in Scotland* (1974); and Sturm (n 31 above).

phases of a single social process of trying to give meaning to our public values. Rights operate in the realm of abstraction; remedies in the world of practical reality. In Fiss's opinion, a right is a particularised and authoritative declaration of meaning; it can exist without a remedy. Fiss views a remedy as an effort of the court to give meaning to a public value in practice. A remedy is more specific, more concrete and more coercive than the mere declaration of a right; it constitutes the actualisation of the right.[100]

In some cases, the considerations bearing on what remedies are available may be different from the principles that determine the existence of liability.[101] Remedies from this perspective are conceptualised as being pragmatic, discretionary and political.[102] This approach to remedies is in accord with the concept of interest-balancing, which requires that remedial effectiveness for the victims is only one of the considerations; other social interests are also relevant.[103]

The theories that de-link right and remedy have been particularly attractive in litigation challenging systemic violations arising from organisational or institutional behaviour. It has been submitted that the character of litigation challenging systemic violations precludes the possibility of deducing the remedy for the violation from the right.[104] This is because in litigation of this nature, it may be hard to establish concrete responsibility for a violation. And even more pertinent is the fact that remedial burdens may be borne by persons not party to the litigation. It is from these two perspectives, as based on the theories of corrective and distributive justice, that the relationship between rights and remedies should be discussed.

Scholars such as Gewirtz perceive remedies as having an impact on the content of the rights themselves. For this reason, it is submitted that rights and remedies cannot be looked at separately: '[T]here is a permeable wall between rights and remedies.'[105]

100 Fiss (n 99 above) 52.
101 Wells & Eaton (n 53 above) xviii xx.
102 Cooper-Stephenson (n 17 above) 5.
103 Gewirtz (n 75 above) 183 adds that under rights maximising, an incompletely effective remedy is acceptable only if a more effective remedy is impossible to achieve. In his opinion, under interest balancing, an imperfect remedy is also permissible when a more effective remedy is deemed too costly to interests other than those of the victims.
104 See Sturm (n 31 above) 1390.
105 Gewirtz (n 75 above) 678-679.

On the basis of the above, it has been submitted that rights and remedies are inextricably linked as parts of an integral whole and that the determination of neither rights nor remedies can be done in isolation,[106] and that the so-called rights would have no meaning unless the remedial consequences of their non-recognition are incorporated in their definition.[107] Selecting an appropriate remedy is therefore considered to be an integral part of defining the right.[108] To illustrate this point, Cassels uses the example of the right to property: It would be unrecognisable if it were not for the fact that courts are willing to grant injunctions instead of damages for trespass.[109] In the same line, it is submitted that historically, the law has moved from remedies to rights rather than from rights to remedies, and that a right is only a right if it has a corresponding remedy.[110]

Using a concept called 'remedial equilibration', it has been submitted that 'rights are dependent on remedies, not just for their application to the real world, but for their scope, shape, and very existence'.[111] This is contrasted with the concept of 'rights essentialism', a way of thinking that assumes that the process of interpreting constitutional rights begins with judicial identification of a constitutional value and then moves into the operational rule, which is the remedy.[112] Remedial equilibration requires that rights are often shaped by the nature of the remedies that will follow if the rights are violated.[113] In this respect, systemic violation cases have been used to show that, in causal terms, rights essentialism avers that causation

106 Cooper-Stephenson (n 17 above) 6.
107 Cooper-Stephenson (n 17 above) 9.
108 J Cassels 'An inconvenient balance: The injunction as a Charter remedy' in Berryman (n 17 above) 288.
109 Cassels (n 108 above) 288 contends further that remedial consequences have a habit of flowing backwards to affect the definition of the rights themselves; that the law of negligence would not be as defined as it is today if the only available remedy was an award of damages.
110 B Kercher & M Noone *Remedies* (1990) 1.
111 D Levinson *Rights essentialism and remedial equilibration* (1999) Working paper No 99-5, Legal Studies Working Paper Series, University of Virginia School of Law 3, sourced at SSRN: http://ssrn.com/abstract=155564 (accessed 25 June 2006); also published in (1999) 99 *Columbia Law Review* 857.
112 Levinson (n 111 above) 2. Levinson contends that constitutional rights do not in fact emerge from abstract interpretations of constitutional texts, structure and history, or from philosophising about constitutional rights. In his opinion, constitutional rights are inevitably shaped by, and incorporate, remedial concerns (16).
113 Levinson (n 111 above) 17. According to Levinson, the cash value of any rights is the function of the remedial consequences attached to its violation. See also Wells & Eaton (n 53 above) xx, where they argue that the courts' actual practice appears to depart from the view that rights and remedies are different, that whether or not a right exists in a given situation may depend on the remedy sought by whoever is asserting the right.

runs from rights to remedies, yet these cases show that it is the reverse.[114]

Criticism is, however, directed to the fact that the functions of idealisation and actualisation are in some cases performed by the same person, the judge. 'Even though the meaning-giving process may require a unity of functions, the risk is always present that the performance of one function may interfere with the other.'[115] It is submitted that, although judges may use their shrewdness to devise strategies that achieve structural reforms, for instance, their independence is likely to be lost in this process. The need to work through these strategies will force the judge to compromise on some of his or her principles and lead to the sacrifice of some interests.[116] Some scholars therefore believe that rights and remedies represent the ideal and the actualised, yet judges are not in a position to perform both functions.[117] On the basis of this it is contended that the courts lack the legitimacy to make policy decisions that may be necessary in the process of actualisation.[118]

The distinction between rights and remedies has also been supported by the submissions that describe the intellectual fabric of constitutional law. This intellectual fabric is believed to draw a distinction between statements which describe an ideal that is embodied in the Constitution, and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues. The defining statement has been described as a 'concept' and the application statement a 'conception':

> The distinction between a conception and its parent concept can explain and justify some norms of apparent 'slippage' between a constitutional norm and its enforcement. Thus, for example, it is possible for persons to agree as to the abstract meaning — the concept — of a norm, yet disagree markedly over the conception which ought to be adopted to

[114] Levison (n 111 above) 27. This approach, which sees rights and remedies as being inseparable, has been described as a 'monistic view'. See Berryman (n 53 above) 9. Other scholars who believe in the relationship between rights and remedies include H Lawson *Remedies of English law* (1980). Lawson's point of departure is that the phrase *ubi jus remedium* ('where there is a right there is a remedy') can be followed in realistic terms by *ubi remedium ibi jus* ('where there is a remedy there is a right') (1). He goes on to contend that the rights that are recognised by the law have crystallised around the remedies - 'a remediless right is not regarded by lawyers as a right' (1-2). Again, here Lawson differs from scholars in his school of thought when he distils his discussion to the relationship, not of rights and remedies, but of wrongs and remedies. It is not very clear why Lawson prefers the term wrong to right.

[115] Fiss (n 99 above) 53. He submits also that actualisation of a structural variety creates a network of relationships and outlook which threatens the independence of the judge and the integrity of the judicial process as a whole.

[116] Fiss (n 99 above) 53-54.

[117] It is, however, demonstrated in ch six sec 6.6.3 that judges could still perform this function and maintain their impartiality and independence.

[118] See Sager: 1978, at 1213.

> realise that concept. Likewise, it is possible to remain faithful to an [*sic*] historical understanding of the concept embodied in a constitutional norm and yet, over time, to revise drastically the conception through which it enjoys enforcement. *But in any of these circumstances, the concept governs the conception, for the very purpose of the conception is the realisation or understanding of the concept. From this observation it follows that a valid conception should 'exhaust' its parent concept.*[119]

Though situations are envisioned in which people may disagree on the remedies accompanying violations of a right, it is contended that all the remedies will be intended to realise the right, which is the purpose of the remedies. Remedial theory should, therefore, be developed with the right(s) it protects in mind.[120]

In contrast, judges are urged not attempt to deduce remedies from the nature of the violation, but rather to fashion them to achieve compliance with the Constitution in the future.[121] Courts can invoke the breadth of their remedial powers to justify ordering remedies that respond to harms and conditions that may not be casually connected to proven violations, and also to balance all interests affected by the remedy.[122] It has, for instance, been submitted that '[f]actors not considered in determining liability play an important role in formulating the public law injunction'.[123] It is therefore important that both the consequences of the wrongful conduct and the steps necessary to remedy them are mediated through a complex set of formal and informal relationships that may be irrelevant to establishing the legal violation but critical to the development of a remedy adequate to eliminate that violation. This is because the task of correcting the defendants' wrongful conduct raises factual and normative issues that do not arise in the course of determining

[119] Sager (n 99 above) 1213 (my emphasis). One could submit that this explains why people may agree on the need for the protection and advancement of people's socio-economic wellbeing and yet disagree on whether or not this should be done through justiciable rights enforceable through the judicial process.

[120] In *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC); 1997 12 BCLR 1675 (EZ) Kriegler J stated that 'our flexibility in providing remedies may affect our understanding of rights' (para 27). In their comment on this case, Currie & De Waal (n 85 above) 192 contend that when the courts have wide remedial discretion to fashion an appropriate remedy, they will be less likely be deterred from finding a violation than would be the case if their discretion is narrow. While Currie & De Waal immediately suggest that deciding on a remedy requires a much more pragmatic approach than that adopted in any other stages of bill of rights litigation, they mention that many relevant factors at the remedial stage are also relevant at other stages of the litigation.

[121] See Walker (n 99 above) 4.

[122] Roach (n 9 above) 3-2 to 3-3.

[123] Roach (n 18 above) 888.

liability, such as the effectiveness and practicability of various remedial options.[124]

4.3.1 Synchronisation of the rights and remedies debate

While one may be inclined toward the view that rights and remedies are two different notions, it is, in my view, impossible to understand remedies without understanding the constitutional rights themselves.[125] Though rights and remedies may be kept separate, it is not true that they are governed by fundamentally different considerations. 'Fundamentally different' is too extreme in my opinion. It is submitted that the first objective of any court adjudicating constitutional rights should be to craft remedies that realise the right in full. However, there could be circumstances where the remedial approach that realises the rights fully adversely affects other legitimate interests, imposes burdens that are impossible to discharge, or undermines the right(s) in the long run. In such circumstances the court is justified to consider the issue of the most appropriate remedy separately from the right in issue.[126] The court should confront the practicalities on the ground and assess their impact on the remedy.[127] The prevailing circumstances, if not considered, may have the potential of undermining or even making it impossible to implement the selected remedy.[128] This is very important as it is one of the factors that define what is meant by an

[124] Sturm (n 31 above) 1364. Sturm submits further that the court cannot simply rely upon the processes used to generate a liability decision to formulate a structural remedy, because the trial on the merits does not provide a sufficient legal or factual basis for adopting a particular remedy.

[125] Wells & Eaton (n 53 above) xix.

[126] In *Milliken v Bradley* 433 US 267 (1977), eg, the United States Supreme Court observed that the nature of remedies is determined by the nature and scope of the constitutional violation; the remedy must therefore be related to the condition alleged to offend the Constitution. According to the Court, the decree must be designed as nearly as possible to restore the victim to the condition they would have occupied in the absence of the wrong. But the courts must take into account the interests of the state and local authorities in managing their own affairs, consistent with the Constitution (281).

[127] According to Shelton (n 12 above) 53, the question of possible non-compliance, eg, is very important; it may be necessary for the ideal to adjust to the reality of popular opposition to the legal rule.

[128] Cooper-Stephenson (n 17 above) 2 3 has submitted that an analysis of the law of remedies which accommodates the practicalities of implementation contributes to the understanding of the very nature of law. He contends that the taxonomy of remedies should move from a realistic appraisal of the defendant target of the remedy, through a purposive analysis of the goal of the remedy, to matters of legal principle and procedural regulation, and back to implementation considerations involving a realistic analysis of remedial functioning. Schucks has described as the 'pure rights' conception an approach that concentrates on the role of the court in identifying individual rights while downplaying their implementation. Schucks describes this approach as unrealistic and naïve. See Sunstein (n 87 above) 754.

'appropriate, just and equitable relief'.[129] A remedy that is impossible to implement, however beautifully crafted, does not answer to the needs of an 'appropriate, just and equitable' remedy. This, though, does not mean that the right disappears completely from consideration; instead, the right has to be kept in mind by the court. The remedy and enforcement procedures chosen by the court must be those that lead to the realisation of the right, if not in the short run, at least in the long run.

The process above should not be viewed as a way of limiting a right; rather it is a process of ascertaining the best way of enjoying the right in the prevailing circumstances. This exercise therefore differs from the process of limiting rights as envisaged by section 36 of the Constitution.[130] Limitation of the right once proclaimed, on the one hand, devalues the right to the extent of the limitation. In contrast, interest balancing may be preceded by a full recognition of the rights followed by what is seemingly a weak remedy. The weak remedy may be the best way of recognising the right in the circumstances.[131] As is submitted above,[132] the school desegregation cases provide a good example of how weak remedies may actually be intended to protect the rights themselves. However, as already stated, this is not to suggest that the remedies will not in any way impact on the nature of the right.[133] This, though, may be circumstantial and arise on a case-by-case basis. Yet the impact, though negative, is always considered the best way of enjoying the right in the circumstances.

Furthermore, one could argue that there is no need for the courts to adopt one line of thought, either believing in a causal relationship

[129] In *Modder East Squatters v Modderklip Boerdery; v President of the Republic of South Africa v Modderklip Boerdery* 2004 8 BCLR 821 (SCA) (*Modderklip* case No 1), while quoting the dicta of Justice Kriegler in the *Fose* case (n 90 above) para 94, Harms JA noted that courts should not be overawed by practical problems, they should attempt to synchronise the real world with the ideal construct of a constitutional world and mould an order that will provide effective relief (para 42).

[130] See ch three sec 3.2 for a detailed discussion of the sec 36 approach.

[131] On the meaning of weak remedies and their usefulness, see generally M Tushnet 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* 2 and M Tushnet 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas Law Review* 1895.

[132] Sec 4.2.2.

[133] In this respect, one would agree with Cassels (n 108 above) 288 291 that remedial definition is inextricably interwoven with substantive definition and maintaining flexibility at both levels allows the courts to take a far more subtle approach to its task. Cassels contends that the assumption that interest balancing can be fully accommodated when defining the right, and that, once defined, the rights must be fully vindicated, is misconceived. In his opinion, this would undermine the need to approach constitutional rights issues with the necessary delicacy and subtlety. One understands Cassels to mean that the process of balancing the interests that delicacy may demand should be continued to the level of selecting an appropriate remedy.

between rights and remedies or in rights and remedies as two different phenomena. The line that the court follows should be shaped by the circumstances of each case and the demands of justice in that particular case. The court should apply relationship theories, not as two separate concepts from which it must choose one, but as two points at the opposite ends of a sliding scale. The position of the court on this sliding scale should be determined by the demands of every case. The discussion in chapter six will show that in structural reform litigation, for instance, the demands of justice have always required that the courts incline more toward the side of the scale which disentangles rights from remedies. The context within which the Constitution is enforced therefore matters.[134]

4.4 Conclusion

This chapter has laid down the theoretical foundation for understanding how the philosophy of justice to which a court is inclined influences its approach to granting remedies. What is clear from this discussion is that it is important for courts to appreciate that practical considerations play a role in deciding the notion of justice to which a court should incline. The notion of corrective justice is presented as an attractive way of doing justice for the benefit of persons whose rights have been infringed. This is done by putting such persons in the position they would have been in but for the violation. However, restoring the position of the victim may in some cases present practical problems. It may, for instance, impose burdens on third parties to the litigation or impose unfairly high costs on the defendant. This is in addition to having a negative impact on the public interest.

Sticking to corrective justice will also make the realisation of the rights dependant on a person's capacity to access courts and enforce their rights. In other words, justice will be a preserve of those with 'the sharpest elbows'. However, this is problematic: Not so many people, because of poverty and ignorance, have the capacity to access courts This is in addition to the potential of opening the floodgates and overburdening the courts arising from the impression that rights can only be realised through judicial processes.

[134] The Constitutional Court has adopted a contextual approach to interpretation of the Constitution. The Court has, amongst others, used the historical and textual context to give meaning to the rights in the Bill of Rights. See *Brink v Kitshoff NO* 1996 2 SA 197 (CC) para 40; and *S v Makwanyane* 1995 3 SA (CC) paras 17-18. The content of the rights and the obligations they engender are, amongst others, dictated by the context leading to the adoption of the Constitution. This is in addition to the socio-economic and political context in which they are enforced. Yet every right has to be read in the context of other rights and provisions of the Constitution. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) para 83.

It is at this point that the theory of distributive justice becomes most relevant. The theory of distributive justice may be used to engage a process of interest balancing which requires consideration of interests other than those of the plaintiff. The distributive justice theory is more flexible and bent towards a practical consideration of the impact of the remedy. This theory of justice, as I submit in the next chapter, is relevant to situations that require a re-distribution of resources, as is the case in South Africa. The notion of distributive justice places an individual as part of his community and whose welfare is dependent on the welfare of everybody else. It is important that this situation be reflected in the remedies that courts grant for the infringement of rights.

However, this does not mean that corrective justice is completely irrelevant. In respect of those cases which are discrete and where the victims have suffered at the hands of identifiable government officials, they should be put in the position they would have been in but for the violation. For instance, it is submitted in chapter five that under such circumstances, compensatory damages may become an appropriate remedy.[135] This should be so especially in those cases which do not give rise to structural problems that require structural reform, as is discussed in chapter six.

It is also important for the courts to consider the remedies differently from the relevant rights by separating the two processes. This is because linking the remedies to rights determination may make it hard for the courts to factor in the interests of third parties, if this is considered to have a negative impact on the maximisation of the right. This, however, does not mean that the right is completely irrelevant at the remedy-determination stage. It has been submitted in this chapter that a court's first objective should be to maximise the right. This should, however, be done only where the case is of such a nature that maximising the right will not be at the cost of other legitimate interests. In addition to this, it should be clear to the court that the maximisation of the right will not create insurmountable obstacles at the remedy implementation stage.

What remains to be seen is how the South African courts have been influenced by the theories of both corrective and distributive justice. This is what the next chapter sets out to investigate.

[135] See ch five sec 5.3.1.

CHAPTER 5

SOUTH AFRICA: DISTRIBUTIVE OR CORRECTIVE JUSTICE?

5.1 Introduction

This chapter discusses the impact that the notions of both the corrective and distributive justice have had on South Africa's approach to constitutional remedies.[1] The South African courts have sought to focus their remedies beyond the individual litigant and to grant remedies that advance constitutional rights as extending 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 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 considered the impact of proposed remedies on the defendant and how the relationship between the defendant and the plaintiff would be affected.

To protect the constitutional values, the courts have, in some cases, awarded plaintiffs relief in circumstances where they may have not deserved it.[2] The Constitutional Court 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. But in the same cases, the interests of the community and the interests

1 Parts of this chapter are reproduced in *The South African Law Journal*. See C Mbazira '"Appropriate, just and equitable relief" in socio-economic rights litigation: The tension between corrective and distributive forms of justice' (2008) 8 *South African Law Journal* 64.

2 In *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* Case 603/05 (unreported), the High Court showed a determination to protect the rights in the Constitution even if this would benefit litigants that had themselves been found guilty of disregarding the Constitution. Plasket J stated that, although the applicants had displayed a lack of respect for, and undermined, the Constitution and its democratic processes and institutions, he considered it necessary, in order to vindicate the Constitution, to grant the bulk of the relief sought (paras 82 & 83).

of the defendant too have featured in what the Court has called 'a balancing process'.[3]

This chapter is divided into two sections. The first section illustrates the Constitution's inclination towards the notion of distributive justice. Distributive justice is implicit in the provisions of the Constitution that protect what may be construed as rights conferring collective benefits and the protection it accords to collective values upon which South Africa is founded. The second section illustrates the inclination of the South African courts, especially the Constitutional Court, towards the notion of distributive justice. This is reflected in the Court's understanding of what it considers to be 'appropriate, just and equitable relief'. This section discusses the different remedies that the courts have granted so far and illustrates how these have been influenced by the notion of distributive justice. However, the interdict is reserved for detailed consideration in chapter six. This is due in part to its high potential to promote the notion of distributive justice and also because of the controversies surrounding this remedy. Chapter six proposes a set of norms and principles that could be used to determine when the structural interdict constitutes 'appropriate, just and equitable relief' in any given context.[4]

5.2 The 1996 Constitution and distributive justice

Though the South African Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions that this is the ideal form of justice that is envisioned. In terms of social justice, the Constitution is premised on the need to realise an orderly and fair redistribution of resources.[5] The Constitution in this respect demonstrates a commitment to the establishment of a society based, amongst others, on social justice.[6] In addition to protecting individual rights, the Constitution guarantees a number of socio-economic rights directly linked to social justice.[7] While socio-economic rights have elements that are capable of extending individual entitlements, they also make provision for elements that can only be enjoyed in a group.[8] This is especially in respect of the positive elements of these rights which compel government to undertake affirmative action to realise

3 See *Hoffman v South African Airways* 2000 11 BCLR 1211 (CC) (*Hoffman* case).
4 See ch six sec 6.6.
5 See D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 304.
6 Preamble.
7 See S Gloppen *South Africa: The battle over the Constitution* (1997) 58.
8 Examples include elements of such rights as a clean and healthy environment and also benefits of such rights as housing and health that can be put in place for a number of people or groups of people.

the rights. Obligations of this nature compel government to provide goods and services directed at all members of society or 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 also makes it difficult, if not impossible, to sustain such levels of services for the individual or the community. Consider the right of access to water,[9] for instance. It requires the government to put in place water services provision systems that are accessible to everyone.[10] The right of access to health care services is not different.[11] 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 1996 Constitution is perceived as an instrument to transform South African society, among others, from a society based on socio-economic deprivation to one based on equal distribution of resources.[12] The 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.[13] 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.[14] However, even when socio-economic rights are accepted as justiciable, there is always the question of whether they should be enforced as conferring individual benefits or as conferring group benefits.[15] In the Constitution itself, most socio-economic rights are crafted as individual rights, thus 'everyone has the right to …'[16] and 'every child has the right to …'[17] Nonetheless, the question remains whether the prevailing social and economic context allows for the

9 Sec 27(1) of the Constitution.
10 See the Water Services Act 108 of 1997. See also C Mbazira 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati' in J de Visser & C Mbazira (eds) *Water delivery: Public or private* (2006) 57-85.
11 n 9 above.
12 See generally K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147.
13 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 352.
14 See ch 2 sec 2.3 for a detailed discussion of separation of powers and institutional competence concerns.
15 K Roach 'Crafting remedies for violations of economic, social and cultural rights' in J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 111.
16 Secs 26(1) & 27(1).
17 Sec 28(1)(c) of the Constitution.

enforcement of these rights as conferring individual benefits on demand, in which case corrective justice would be applicable.[18]

There is a need, therefore, to understand the existing socio-economic context and its impact on the enforcement of socio-economic rights. It is only after appreciating the historical, social, political and economic settings that one can appreciate the challenges of enforcing socio-economic rights as conferring individual rather than collective benefits.[19] 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.'[20]

In South Africa, socio-economic rights assume their importance from a context which is characterised by not only racially institutionalised poverty, but also by a commitment to alleviate or eradicate such poverty.[21] The majority of South Africans live under extreme poverty as an offshoot of apartheid. 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'.[22] One of the obstacles to the realisation of this objective, however, is limited financial resources. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. Holistic approaches of 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. One therefore has to rethink the traditional idea that remedies must be immediate and that the courts can order one-shot remedies that achieve corrective justice.[23] Remedies of this nature may not be practicable where rights have to be enforced in ways that provide collective benefits. This is particularly so in a context where scarce financial resources dictate how government fulfils its socio-economic rights obligations.

18 The courts would have to enforce the individual rights by putting victims in the position they would have been in had their individual rights not been violated. See ch four sec 4.2.1.

19 AJ Van der Walt 'The state's duty to protect owners versus the state's duty to provide housing: Thoughts on the *Modderklip* case' (2005) 21 *South African Journal on Human Rights* 148.

20 P de Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 262.

21 AJ van der Walt 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* 253 255.

22 De Vos (n 20 above) 260.

23 Roach (n 15 above) 111.

The realisation of socio-economic 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 needs of the individual and to consider the interests of society or groups of people at large. Individual rights therefore have to be balanced against collective welfare.[24] 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'.[25] The Constitutional Court had to leave it up to the hospital to decide how best to utilise the scarce medical resources in a distributive manner without prioritising individual needs at the expense of others who may need such resources.

It is on the basis of this approach that the Constitutional Court, as seen in chapter three,[26] has rejected the submission that the socio-economic rights provisions in the Constitution confer individual entitlements on demand. The Court has rejected the submission that the Constitution be interpreted as establishing a minimum core which entitles every individual to a minimum level of goods and services on demand.[27] The Court has also rejected the submission that section 28 of the Constitution guarantees every child access to basic nutrition, shelter and health care services irrespective of available resources. Instead, the Court has chosen to locate the claims of all individuals, adults and children within the broader dimension of society's needs. As seen in chapter three, the Court has held that all that the state is obligated to do is to put in place a reasonable programme, reasonably implemented to achieve the progressive realisation 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.

The Constitution is also encrusted with what are considered to be the values upon which democratic South Africa is based.[28] Indeed, the

24 Z Motala & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 34.
25 De Vos (n 20 above) 259-260.
26 See sec 3.2.1.
27 See *Government of the Republic of South Africa v Grootboom and Others* (*Grootboom* case) 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) para 32. See also *Minister of Health and Others v Treatment Action Campaign* 2002 5 SA 721 (CC). See ch three sec 3.2 for a detailed discussion of these cases.
28 Sec 1. 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.

courts are constitutionally obliged to promote these values whenever interpreting the Bill of Rights.[29] Though some of the values may be used to promote individual welfare, the Constitutional Court has used the concept of values to advance the common good of society. Even when protecting individual rights, the Court has on some occasions used values that promote general welfare to justify such individualised protection.[30]

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.[31] To effectively use these external values, not necessarily found in the Constitution, the Constitutional Court has freed itself from textualism as the only method of constitutional interpretation. The Court has used such other methods as purposive interpretation[32] to give effect to the values underlying the Constitution.[33] In the *Makwanyane* case, for instance, the Court used this method of interpretation to read into the Constitution the value of *ubuntu*, a concept encrusted with notions of distributive justice.[34]

It has been submitted that, although *ubuntu* is not mentioned in the Constitution, it coincides with some of the values expressly mentioned.[35] The Constitutional Court has indeed found no problem using *ubuntu* to promote distributive justice.[36] As will been seen later, the Court has used the value of *ubuntu* as the basis for setting aside an order of excessive damages against the defendant in a case

29 Sec 39(1)(a).

30 An example of this and, as discussed later, is the use of the concept of *ubuntu* to advance the individual's right to life. The individual has therefore been placed 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).

31 See I Kroeze 'Doing things with values: The role of constitutional values in constitutional interpretation' (2001) 11 *Stellenbosch Law Review* 267-268.

32 Also referred to as 'value-oriented' or 'teleological' interpretation; see J de Waal & G Erasmus 'The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition' (1996) 7 *Stellenbosch Law Review* 179 181 fn 8.

33 *Makwanyane* case (n 30 above) para 9. See also *S v Zuma* 1995 4 BCLR 401 (CC) para 15.

34 See generally I Kroeze 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* 252.

35 Kroeze (n 34 above) 256.

36 In the *Makwanyane* case (n 30 above) para 224, the Constitutional Court described *ubuntu* as follows: as a culture which places some emphasis on communality and on interdependence of members of a community; it recognises 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. According to the Court, however, it also entails the converse: The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of the community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all. See also para 263.

of defamation.[37] The Court has 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 traumatised society to overcome and transcend the division of the past.'[38] According to the Court, today *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.[39]

Promotion of the constitutional values has, therefore, been central in the transformative enterprise of the Constitutional Court. 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 interpreting the substantive content of the rights, but also in determining the kinds of remedies that their violation demands. This approach has made the inclination toward the notion of distributive justice inevitable in the conception of an 'appropriate, just and equitable' remedy, as discussed in the next section.

5.3 'Appropriate, just and equitable relief'

Other than merely enforcing the values that promote commonality, the Constitutional Court's resort to the ethos of distributive justice is reflected 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'[40] and to make 'any order that is just and equitable'.[41] 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 understanding of an 'appropriate, just and equitable' remedy will be determined, among others, by the notion of justice favoured by the court. In this respect, the phrase 'appropriate, just and equitable' remedy could assume two meanings: It could refer to a remedy that is required by an individual whose

37 In *Dikoko v Mokhatla* 20071 BCLR 1 (CC) (*Mokhatla* case). This case arose from a purely private law delictual claim in defamation. R 110 000 had been awarded by the High Court as compensation for the defendant's defamatory statement. The defendant's appeal to the Supreme Court of Aappeal was dismissed, which prompted him to approach the Constitutional Court. On appeal, the defendant contested, amongst others, the quantum of damages as excessively disproportionate or unreasonable (para 24). The Constitutional Court, however, widened this issue; it questioned whether an award of damages was the most appropriate remedy to vindicate the constitutional right to human dignity.

38 Para 113 [footnote omitted].

39 As above.

40 Sec 38 of the Constitution.

41 Sec 172(1)(b) of the Constitution.

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. It could also 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.[42]

As seen in chapter four,[43] because of the bipolar nature of the theory of corrective justice, the burdens imposed by a remedy on third parties are not a factor to consider when choosing remedies.[44] In contrast, distributive justice pays attention to the interests of not only the parties but also of third parties. The remedy should also be intended not only for the benefit of the plaintiff but for other similarly situated persons. This is in addition to protecting the interests of society at large.

It is on the basis of the above that the Constitutional Court has taken cognisance of the fact that when constitutional rights are violated, though the victim may be an individual, society as a whole is injured.[45] If any remedies are to be obtained for such a violation, they should be aimed at vindicating not only the victim but also advancing the interests of society as a whole.[46] 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.[47] 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.[48] It is on the basis of this that the Constitutional Court has adopted an approach that spreads the benefits of constitutional litigation beyond the parties in a particular case. This explains why, for instance, the Constitutional Court has on some occasions rejected proposed out-of-court settlements between

42 K Roach *Constitutional remedies in Canada* (1994) 3-4.
43 Sec 4.2.1 above.
44 Roach (n 42 above) 3-21.
45 In the *Hoffman* case (n 3 above), the Constitutional Court observed that fairness requires a consideration of the interests of all those who might be affected by the order. According to the Court, in the context of employment, this will require a consideration not only of the interests of the prospective employee, but also the interests of the employer and that in other cases, the interests of the community may have to be taken into consideration. Para 43.
46 Roach (n 42 above) 3-30.
47 D Shelton *Remedies in international human rights law* (1999) 52. Shelton submits that actions against the state test the reasonableness of the state's activity in its context, the need to protect society, and the fairness of allowing the victim's damage not to go without redress. See also J Cassels 'An inconvenient balance: The injunction as a Charter remedy' in J Berryman (ed) *Remedies, issues and perspectives* (1991) 290.
48 I Currie & J de Waal *The new constitutional and administrative law* (2001) 195.

the parties if it would result in a benefit of a constitutional right only to the parties.[49] The Court has held that an offer to settle a dispute made by the litigant to the other, even if accepted, cannot cure the ensuing legal uncertainty as it would settle the dispute only between litigants. According to the Court, this would not resolve the unconstitutionality of the impugned provisions and the interests that they have on the broader group of persons who may qualify for a similar benefit.[50] The Court has also on occasion declined to award remedies even where a violation of a constitutional right has been proved if the interests of good governance require this.[51]

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 Constitutional Court has observed that the balancing process must be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter violations; and third, to make an order that can be complied with. This is in addition to ensuring fairness to all those who might be affected by the relief.[52] Accordingly, successful litigants should obtain the relief they seek only when the interests of good government do not demand otherwise. The position of the Constitutional Court, therefore, is that litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants.[53] This is important because, despite the fact that South Africa has an advanced constitutional system, courts are still not easily accessible to all.[54] Any remedies granted in constitutional litigation should therefore extend the constitutional benefits to those without easy access to courts.

As noted above, in the *Mokhatla* case, for instance, the Constitutional Court held that the principal objective of culture and

49 See *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others* 2004 6 BCLR 596 (CC) (*Khosa* case). For a detailed discussion of this case, see ch three sec 3.2.3. During the course of hearing this case, the respondents indicated their willingness to enter into a settlement that would have extended the definition of a 'South African' citizen to accommodate the specific applicants and thereby extend social benefits to them only which would have extinguished the case. This settlement would have had little impact on others similarly situated.

50 *Khosa* case (n 49 above) para 35.

51 See *East Zulu Motors (Pty) Ltd v Empangeni/Ngwlezane Transitional Local Council and Others* 1998 2 SA 61 (CC); 1998 2 BCLR 1 (CC); and *Steyn v The State* 2001 1 BCLR 52 (CC); 2001 1 SA 1146 (CC).

52 *Hoffman* case (n 3 above) para 45.

53 *S v Bhulwana* 1995 12 BCLR 1579 (CC) para 32, cited with approval in *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) and Others* 2004 5 BCLR 445 (CC) para 74.

54 J Dugard 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) 22 *South African Journal on Human Rights* 261 266.

the law is 'restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms'.[55] 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.[56] This is because an award of excessive damages would have implications on free expression, which is the lifeblood of a democratic society.[57] What this means is that vindicating the plaintiff's injury by awarding excessive damages would be foregone for the sake of maintaining society's right to freedom of expression. The Court in the *Mokhatla* case suggested that consideration should also 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.[58]

The Constitutional Court's approach is in accord with the notion of cost internalisation which, as discussed in chapter four,[59] 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 Constitutional Court has pushed this further by considering the effect of the cost not only from the perspective of non-compliance, but also from the perspective of the benefit that society may derive. This explains why the Court has been reluctant to award damages if these would, for instance, have a negative impact on freedom of expression. As is discussed later,[60] the Court has indeed doubted the appropriateness of damages as a public law remedy and as the most appropriate method to enforce constitutional rights.[61]

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.[62] 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

55 Para 68. The judge does not elucidate on what she means by 'community norms' but, in the context of her judgment, one could conclude that these are the values that we share as a society. This would mean that their infraction affects all members of society who share in the maintenance of these norms.
56 As above.
57 See paras 54 & 92.
58 Paras 64, 67, 112 & 113.
59 Sec 4.2.
60 Sec 5.3.1 below.
61 See generally *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) (*Rail Commuters* case).
62 See M Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 216.

its policy to reflect the elements of a reasonable policy as defined by the Constitutional Court. Taking the example of the case of *Government of the Republic of South Africa v Grootboom and Others*,[63] the judgment may not have resulted in tangible goods and services for the Grootboom community. Generally, however, 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.[64] The government has adopted an emergency housing policy to cater for people who may find themselves in situations similar to that of the Grootboom community.[65] Whether such policy is being implemented, though relevant, is another issue.

There are, however, 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, though the remedy appeared to be directed at the individual victim, the Constitutional Court was convinced that it would benefit similarly situated people. Mr Hoffman had successfully applied for a job with South African Airways (SAA) as a cabin attendant. He had passed all the pre-employment tests save for the medical test, which revealed that he was HIV positive. On this ground he was rejected by SAA, who argued that he posed a health risk since he would not respond to the yellow fever vaccination. SAA also argued that his life span was limited, which made it worthless to spend so much on his training. SAA contended further that it is the practice of airlines to reject HIV-positive people as cabin attendants and that if SAA did not do so, they would be prejudiced in the context of business competition as it would scare away clients. The Constitutional Court rejected all these arguments. It emphasised the vulnerability of HIV-positive people and earmarked them as a disadvantaged group that should be protected by the equality clause.[66] It rejected the submission based on the practice of other airlines as a disguise for prejudice against HIV-positive persons (para 34). The Court accepted the medical evidence to suggest that some HIV-positive persons would respond to the yellow fever vaccine and are fit to work as cabin attendants. It stated that, although some HIV-positive people would not respond to the vaccination and would be

63 *Grootboom* case (n 27 above). This case is discussed in detail in ch three sec 3.2.

64 G Budlender 'Justiciability of socio-economic rights: Some South African experiences' in Y Ghai and J Cottrell (eds) *Economic, social and cultural rights* (2004) 41.

65 National Department of Housing Part 3: National Housing Programme: Housing Assistance in Emergency Circumstances April 2, available at http://www.housing.gov.za/Content/legislation_ policies/Emergency%20%20Housing%20Policy.pdf (accessed 12 April 2006).

66 Para 28.

unfit for cabin work, this was no justification for discrimination against all HIV-positive people.[67] The Court considered instatement to be the most appropriate relief in the case of a prospective employee who had been denied employment on the basis of unconstitutional grounds.[68] The Court considered instatement to be 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.[69]

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.[70] 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'.[71] 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 individualised 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 violations of the rights, which benefits society as a whole. However, this does not mean that the court should completely disregard the impact that individual remedies, such as damages, may have on other legitimate interests.

5.3.1 Purpose of damages — distributive or corrective justice?

The awarding of damages is the oldest kind of remedy recognised and enforced by the common law to redress legal wrongs. Their award, especially as compensatory damages, has for a long time been used to promote the notion of corrective justice. Compensatory damages serve the objectives of corrective justice by making the victim of a violation 'whole' again. This is by putting the victim, as much is possible, in the position that he or she would have been in but for the violation.[72] Compensatory damages may be awarded either as

67 Para 30.
68 Para 50.
69 Para 50.
70 Para 53.
71 Para 52.
72 M Wells & T Eaton *Constitutional remedies: A reference book for the United States Constitution* (2002) 170. In this respect, the awarding of damages presents itself as backward-looking. It focuses on past events, mainly the harm that has been suffered and the extent of the defendant's contribution in liability terms.

'pecuniary' or 'non-pecuniary'.[73] The award of pecuniary damages purports to represent what the plaintiff has suffered directly in monetary terms as a result of the wrong. The plaintiff could have expended quantified monies on medical fees, on replacement of lost property or lost wages resulting from physical incapacity, for instance, because of a tortuous injury.

Non-pecuniary damages do not make up for the money that has been lost by the plaintiff. Instead, they compensate him or her for the pain and suffering caused by the harm.[74] Such pain and suffering may not always be easily reduced to a loss of monetary value; it may include anxiety, depression, embarrassment and humiliation. Non-pecuniary damages are very important because in some cases the pecuniary damage suffered may either be nominal or non-existent.[75] Some forms of injuries, especially in the human rights arena, are hard to assess in monetary terms. It may be hard for someone to express, in monetary terms, for instance, the injury suffered by a gag that violates his or her freedom of speech if what he or she was going to say was not part of his or her trade and would not have generated money. The same may be said in respect of a violation of one's freedom of association and freedom to vote or exercise of religion. However, although the violation of these rights may not result in monetary loss, it may be so egregious so as to warrant the payment of non-pecuniary damages.

A good example of a case to support the above submission is the Sri Lanka case of *Deshapriya and Another v Municipal Council, Nuwara Elye and Others*.[76] The Sri Lanka Supreme Court, after finding a violation of the right to free speech, awarded substantial non-pecuniary damages even if no substantial monetary loss had been suffered. The Court justified this award on the grounds that it would not be right to assess compensation at a few thousand rupees, simply because the newspaper was sold for seven rupees a copy; that this would only be the pecuniary loss caused by the violation of the petitioners' rights of property under ordinary law. The Court said that it was concerned with a fundamental right, which not only transcends property rights but which is guaranteed by the Constitution; and with an infringement which darkens the climate of freedom in which the peaceful clash of ideas and the exchange of information must take place in a democratic society. 'Compensation must therefore be

73 Wells & Eaton (n 72 above) 172.
74 See H McGregor *Mayne and McGregor on damages* (1961) 6.
75 Shelton (n 47 above) 73.
76 [1996] 1 CHRD 115 sourced from the University of Minnesota Human Rights Library, at http://www1.umn.edu/humanrts/research/srilanka/caselaw/Speech/Deshapriya_v_Municipal_Council_Nuwara_Eliya.htm (accessed 3 August 2006).

measured by the yardstick of liberty, and not weighed in the scales of commerce.'[77]

The award of non-pecuniary damages serves not only to vindicate the rights of the individual, but also to deter future infringements. In this respect, one could submit that such an award serves the notion of distributive justice. It protects not only the victim in a particular court case, but other persons that would have, in future, become victims of the conduct of the defendant. Such an award sends out a message to persons planning to engage in conduct similar to that of the defendant that they will suffer the same loss as the defendant.

The deterrent effect of damages awards as described above is founded on law and economics theory-type arguments. These arguments postulate that individuals will engage in a cost benefit analysis before undertaking any activity. The assumption here is based on a hypothetical world in which there are no penalties for committing wrongs and given a choice between acting as one pleases and doing what is required by some legal norm, many people will do as they please, including committing constitutional violations. For this reason, in order to counter the tendency to pursue our own preferences rather than to obey the law, it is necessary to attach sanctions to the breach of legal norms, including violations of constitutional rights. This is because if actors know that doing as they please without regard for others will have bad consequences for their own welfare, through litigation that will cost them in money terms, then they will be dissuaded from illegal conduct.[78]

This economic theory argument is based on three assumptions: (1) that conditions of scarcity preclude the fulfilment of every human desire; (2) that in a condition of scarcity, most individuals behave rationally most of the time in pursuit of their desires; and (3) that individuals are the best judges of their own preference.[79] On the basis of these assumptions, it is believed that individuals will only engage in certain activities where the benefit to be obtained exceeds the costs that may be incurred if caught.[80] The law therefore best stops wrongful conduct by imposing costs by way of damages as a consequence of engaging in prohibited activities. In this respect, the amount of damages need not be compensatory as this would denote some direct relationship between the damages paid and the victim's loss and its magnitude. Instead, damages are set at an appropriate

77 371.
78 Wells & Eaton (n 72 above) 176.
79 Shelton (n 47 above) 41.
80 M Polinsky & S Shavell *The economic theory of public enforcement of law* M John Olin Program in Law and Economics, Working Paper 159 (1998), sourced at http://papers.ssrn.com/ paper.taf?abstract_id=93709 (accessed 28 July 2006) 4. See also Shelton (n 47 above) 41.

level to deter future infringement;[81] as submitted above. If damages are minimal and 'affordable' to certain actors, it may fall within their accepted cost-benefit analysis.

Weaknesses with the deterrence (distributive) effect of damages

There are, however, a number of weaknesses in the deterrence effect as based on the concept of law and economics. First, sometimes damages are not calculated on the basis of the gains that the violator may derive from the infringements. This is because, in some cases it may be impossible to express the gains in monetary terms. This makes it hard to calculate, with precision, the amount of damages that outweigh the benefits to be derived from the violation. The damages awarded may therefore be less than what would lead to deterrence or may be overly excessive. In the same line, when government infringes rights, for instance, it may not view the benefits of such infringement in monetary terms. Yet the political gains derived may in the government's opinion outweigh any damages likely to arise from a finding of a violation. The government may therefore be prepared to embark on such conduct irrespective of the possibility of damages being awarded against it.

Secondly, there is always no guarantee that the award of damages against the defendant will deter other potential defendants.[82] Persons engaging, or intending to engage, in similar conduct may be much wealthier or deriving much more in terms of gains than the defendant. They may therefore not suffer as a result of an award of damages if caught. This is in addition to the conviction on the part of such other violators that they will never be caught or dragged to court. Indeed, the greatest deterrent is the likelihood that offenders will be apprehended, convicted and punished.[83] If the offenders do not anticipate being caught and convicted, they will not be deterred by damages awarded against defendants who have been caught and convicted. Additionally, whether or not the possibility of being dragged to court is high is also dependent on the character and status of the victims of the violation. Poor, uneducated and vulnerable victims may not have the capacity to sue the wrongdoers for damages. Persons violating the rights of such victims will therefore continue to do so with impunity as they will not anticipate any conviction or apprehension.

Another weakness of awarding damages is that it offers only general deterrence because it leaves it to the government

81 Shelton (n 47 above) 41.
82 J Park 'The constitutional tort action as individual remedy' (2003) 38 *Harvard Civil Rights-Civil Liberties Review* 393 400.
83 Per Chaskalson CJ in the *Makwanyane* case (n 30 above) para 122.

(defendant) to determine how to eradicate the violation. General deterrent remedies of this nature are appropriate when society is not concerned with the exact steps government will take to comply with its obligations.[84] However, where the public is concerned with the exact steps that have to be undertaken to implement and realise the rights, damages will be of limited use. The public may be interested in seeing the government adopt practical steps and measures, in affirmative terms, to end the violation. It could sometimes be through such measures that real assurance of the violation not re-occurring is obtained. Also, an award of compensatory damages, consistent with the principles of corrective justice, is directed at past events. The award does not address the threat of existing and ongoing violations posed, for instance, by a delinquent state institution.[85]

An award of compensatory damages may also be limited as relief for the violation of socio-economic rights. This is because of the diffuse and amorphous nature of socio-economic rights claims.[86] Socio-economic rights litigation seldom involves individualised claims. Instead, it is always undertaken in the interest of communities and groups of people.[87] This applies to litigation arising either from negative but most especially positive violations. The litigants usually take action to enforce a benefit that is not directed at them alone but at a multitude of people. In this kind of litigation, it may be impossible to identify all the individual victims and to determine the harm that they have suffered as a result of the positive infringement

84 Roach (n 42 above) 3-29.

85 W Trengove 'Judicial remedies for violations of socio-economic rights' (1999) 1 *ESR Review* 8.

86 Trengove (n 85 above) 9.

87 In the case of *People's Union for Democratic Rights and Others v Union of India and Others* (1982) 3 SCC 235, the Indian Supreme Court underscored the special character of public interest litigation brought for the benefit of the poor. Bhagwati J observed that public interest litigation as a strategic arm of the legal aid movement is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity. According to the Court, this form of litigation is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making a claim or seeking relief against the other and that other opposing such claim or resisting such relief. The Court viewed public interests litigation as brought before the court, not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position, should not go unnoticed or without redress (240).

of a right.[88] The case of *Modderklip Boerdery (Pty) Ltd v President of the RSA and Others* (*Modderklip* case),[89] discussed in detail below, is an example of a case where it was impossible to identify all the victims because of the transient nature of the population.[90]

However, there could be cases where only an individual or few individuals are targeted by the violation. This is common in respect of negative infringements that interfere with the enjoyment of an individual right. In such a case, although a number of individuals may be involved, it may not be a problem to litigate as an individual. Nonetheless, a violation could be of a negative nature yet involving a multitude of people. Consider a case, for instance, where a municipality, without due process, disconnects water from a multitude of residents.[91] The same practical problems of determining who suffered what damage may arise as is the case with positive violations.

It is for the above weaknesses, among others, that courts have doubts about the appropriateness of damages in constitutional litigation. This doubt is reflected in the approach of the Constitutional Court, as discussed below.

The approach of the South African courts

The position adopted by the South African courts as regards the award of damages in constitutional litigation is similar in many respects to the US and Canadian courts' approach. In all these jurisdictions, constitutional damages have been awarded only where damages for injury cannot be obtained under delictual or other law. Although the courts have not rejected the award of punitive damages, the cases show that there is often a reluctance to award them. The US Supreme Court has, for instance, rejected submissions that damages can be paid for the violation of a constitutional right for its abstract value without proof of actual physical injury or loss. Nonetheless, the Court

88 Trengove (n 85 above) 6 gives the example of the violation of the right to education resulting from discrimination perpetrated over a long period of time. He contends that it is hard to determine how such victims would be compensated; it is even harder where the victims have received some form of inferior education. Trengove submits that the identification of such victims would be a logistical nightmare which would devour valuable resources in a hopelessly, yet inadequate, attempt to determine who should get what.

89 2004 8 BCLR 821 (SCA).

90 As will be seen later, when the case was first instituted in the High Court, the estimated number of occupants of the land in issue was about 18 000, but by the time the case got to the Constitutional Court, the figure had arisen to over 45 000.

91 See, eg, *Residents of Bon Vista v Southern Metropolitan Council* 2002 6 BCLR 625 (W).

has left open the possibility of awarding punitive damages if it is necessary to deter and punish malicious violations of rights.[92]

The US Supreme Court has placed much weight on the principles of tort (delict) law governing the awarding of damages, which it has recognised as applicable in constitutional litigation.[93] Emphasis has been placed on the common law principle that 'a person should be compensated fairly for the injuries caused by the violation of his legal rights'.[94] The Court has added, however, that the common law rules may not provide a complete solution to damages for a deprivation of constitutional rights. Where the interests protected by the constitutional rights are not protected by the common law, there will be a need to adapt the common law in order to provide fair compensation.

This approach was applied in the case of *Bivens v Six Unknown Federal Narcotics Agents*,[95] a case arising from false arrest and imprisonment. The majority of the Court held that, although the Constitution did not provide for the enforcement of constitutional rights by an award of damages, there was nothing precluding the courts from vindicating the rights with such awards. It has been submitted that if Bivens had not been permitted to sue for damages, he would have had no means of redressing the violation of his rights. An interdict would have been useless to him because he had been arrested and then released, and yet no recurrence of the conduct had been anticipated. The Court also held that in the absence of such alternative relief, the Court would exclude the claim only if there were special factors counselling hesitation in the absence of affirmative action by Congress.[96]

The Canadian courts' approach has not been much different from the one adopted in the US. In fact, the Canadian approach has very much been influenced by the US approach. The Canadian courts have embraced damages for compensatory purposes and have declined to award them as a means of vindicating constitutional rights and deterring future violations.[97] The Canadian Supreme Court has

92 In *Carey v Piphus* (*Carey* case) 435 US 247 (1978), the Court held that it remains true that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations (at 266). The *Carey* case was followed by another case, *Memphis Community School District V Stachura* 477 US 299 (1986), where the Supreme Court held that there is no room for non-compensatory damages measured by the jury's perception of the abstract importance of a constitutional right.

93 *Carey* case (n 92 above) 255.

94 As above.

95 430 US 388 (1971).

96 See *Carlson v Green* 447 US 14 (1980).

97 Roach (n 42 above) 11-3.

declined to award punitive damages because it considers such damages to be a fine accomplished without procedural protection as those available in criminal law. Instead, the fine is imposed on a balance of probabilities and does not follow the standard of proof beyond reasonable doubt.[98]

In South Africa, the Constitutional Court has acknowledged the fact that damages may be an appropriate remedy in some circumstances. According to the Court, there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce the rights in the Constitution. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed, at least for a loss occasioned by the breach of a right vested in the claimant by the supreme law.[99]

In the *Fose* case, the plaintiff claimed damages arising from a series of assaults alleged to have been perpetrated by members of the South African Police Services (SAPS) on the plaintiff while in detention.[100] In addition to compensatory damages, the plaintiff claimed punitive damages. He contended that torture was a wide-spread and persistent infringement by members of the SAPS.[101] The Constitutional Court, however, rejected the claim of punitive damages. It upheld submissions that, although punitive damages may lead to systemic change, the process might be a slow one and requiring a substantial number of such awards before change is induced. Yet, such change could be achieved using such equitable relief as the interdict, which is far cheaper and faster.[102]

Like the US and Canadian courts, the Constitutional Court has rejected an award of damages as appropriate in the case of an infringement of the Constitution that does not cause loss.[103] The Court is only prepared to use damages for compensatory purposes where loss is proved. It is on the basis of this that the Court has declined to award punitive damages as a response to infringements of constitutional rights. Accordingly, the Court has held that compensatory damages, once proved, would serve a vindictive role

98 *Vorvis v ICBC* (1989) 58 DLR (4th) 193 (SCC) (*Vorvis* case) 205-206.
99 *Fose v Minister of Safety* 1997 7 BCLR 851 (CC) (*Fose* case) para 60.
100 Para 11.
101 Para 12.
102 Para 65(d).
103 *Fose* case (n 99 above) para 67.

without the need for further damages in the form of punitive constitutional damages.[104] The Court is of the view that the award of damages should not serve to punish but to compensate for the damage caused.[105] As was the case with the Canadian Supreme Court in the *Vorvis* case, the Constitutional Court has alluded to a historical anomaly that has allowed punitive damages, equitable to fines in criminal law, to be awarded against a person without the safeguards afforded by the criminal law: 'It becomes even more unacceptable in a country ... in which extensive criminal procedural rights are entrenched.'[106]

The Constitutional Court is also of the view that there is no real evidence that awarding punitive damages will serve as a significant deterrent against the individual or systemic repetition of infringements.[107] According to the Court, an award of punitive damages, if it is to have a deterrent effect on the government, should be substantial. The problem, in the Court'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.[108] In addition, substantial awards made against the government will significantly impact on the revenue of the government and would arguably impinge on the executive's ability to function effectively: 'Moreover, the use of private law remedies to claim damages to vindicate public law rights may place heavy financial burdens on the state.'[109] As seen above, though the Court has acknowledged the fact that punitive damages may lead to systemic change, it is of the view that the process might be a slow one, requiring 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.[110]

In addition to the above, the Constitutional Court considers damages as having a retrospective effect because they seek to remedy loss caused rather than prevent loss in the future. Furthermore, the Court has held that the award of damages to vindicate human rights violations would amount to measuring something intrinsic to human beings as if these were market-place commodities.[111] The Court has, therefore, concluded that constitutional damages will be awarded only where no relief can be

104 *Fose* case (n 99 above) para 67.
105 *Mokhatla* case (n 37 above) para 78.
106 *Mokhatla* case (n 37 above) para 70.
107 *Fose* case (n 99 above) para 71.
108 As above.
109 *Rail Commuters* case (n 51 above) para 80. The Court observed further that, although there could be circumstances when delictual relief may be appropriate for constitutional violations, the fact that public law remedies may be as effective and appropriate should not be overlooked (para 81).
110 *Fose* case (n 99 above) para 65(d).
111 *Mokhatla* case (n 37 above) para 109.

obtained in litigation other than constitutional litigation. This is the basis upon which the Court declined to award damages in the *Fose* case. The applicant had already secured compensatory damages under delictual law.

The Supreme Court of Appeal (SCA) has adopted the same approach as can be seen, for instance, in *Jayiya v MEC for Welfare, Eastern Cape*.[112] In this case, the SCA declined to uphold an order that 'constitutional damages' be paid arising from the state's failure to approve the applicant's social assistance grant in time. The High Court had awarded compensatory damages, including backpay and interest, to be paid to the plaintiff in a lump sum. The SCA, relying on the *Fose* case, held that constitutional damages could only have been awarded if there was no provision for either statutory or common law remedies.[113] The case was brought under the Promotion of Administrative Justice Act (PAJA),[114] which made provision for a statutory remedy. The SCA held that where the law giver has created mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used.[115] An award of damages would therefore have been construed as disregarding the express intent of the legislature as reflected in PAJA. Since no constitutional challenge had been mounted challenging the remedies provided by PAJA, there was no reason to disregard this Act.

The *Modderklip* case is a good example of a case where an award of damages was appropriate because compensatory relief could not be obtained elsewhere other than in the constitutional case. The facts leading to this case are as follows: During the 1990s, some 400 persons who had been evicted by the Ekurhuleni Metropolitan Municipality from Chris Hani Township moved onto a portion of farmland belonging to Modderklip, and erected about 50 shacks. By October 2000 there were about 4 000 residential units inhabited by some 18 000 persons. On 18 October 2000, Modderklip launched an application for the eviction of the occupiers under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE).[116] The application succeeded and the High Court issued an eviction order on 12 April 2001. A writ of execution was issued and the sheriff was requested to execute. The sheriff, however, responded by insisting on a deposit of R1,8 million in order to cover the estimated costs of a security firm which she intended to engage to assist her in evicting the occupiers and

112 2004 2 SA 611, [2003] 2 All SA 223 (SCA).
113 Para 9.
114 Act 3 of 2000.
115 Para 9.
116 Act 19 of 1998.

demolishing their shacks. This amount by far exceeded the value of the part of the property occupied.

The landowner was unwilling and unable to spend this kind of money on executing the judgment it lodged an application against the state to force the sheriff to carry out the eviction order. Modderklip's case against the state was that failure on the part of the state to carry out the eviction order undermined its right to property as guaranteed by section 25 of the Constitution. The occupants, who had by this time swelled to 40 000, also resisted the eviction and argued that they could not be evicted without the provision of alternative accommodation. It was contended on their behalf that this would undermine their right of access to adequate housing as guaranteed by section 26(1) of the Constitution.

The *Modderklip* case is very significant from the perspective of the notion of distributive justice. Other than merely protect Modderklip's individual right to property, the Court was called upon to consider the impact of an eviction order on the occupants' right of access to adequate housing. The case also indicates that in certain circumstances the award of individualised compensatory damages may produce a distributive effect. The SCA found in favour of both Modderklip and the occupants. The Court ruled that the occupiers could not be evicted without alternative accommodation as this would undermine their right of access to adequate housing. Yet there was a need to protect Modderklip's right to property and to compensate it for the loss suffered by past and future use of the property. This loss was deemed to arise from the state's failure to provide housing to the occupiers. The Court held that this was a burden that could not be placed on Modderklip because it was a constitutional obligation which fell squarely on the shoulders of the state and not on private persons.

The SCA held that the only appropriate relief in the circumstances was constitutional damages to Modderklip. The Court observed that ordering the state to pay damages to Modderklip had the advantage that the occupiers could remain where they were, while Modderklip would be recompensed for that which it has lost, and the state has gained by not having to provide alternative land immediately.[117]

The distributive effect of this order does not lie in the monetary benefits deriving from the award of damages as these went to Modderklip. Instead, the distributive effect lies in the fact that the award produced a benefit for persons other than Modderklip. The award made it possible for Modderklip's right to property to be

[117] 2004 8 BCLR 821 (SCA) 839.

protected and also averted a danger of violation of the occupier's right of access to housing. At the same time, the award was in the interest of the government. Government was saved the burden of having to provide 40 000 people with immediate alternative accommodation. Indeed, the SCA described its order as an aversion of a social problem: 'The immediate social problem is solved while the medium and long-term problems can be solved as and when the state can afford it.'[118]

The outcome of this case was a win-win solution for all the parties involved. The Court managed to balance the competing proprietary rights of a landowner and the socio-economic rights of unlawful occupiers in the context of evictions.[119] The order in this case has been described as reflecting a quintessentially post-1994 perspective on eviction: 'The applicant is entitled to implementation of his eviction order but, for it to be carried out, provision has to be made for the future accommodation of the unlawful occupiers.'[120] The case is important also because it shows how the determination of the most appropriate remedy is highly dependent on the context and circumstances of a particular case. Where the rights of a number of people, including applicants and respondents, have been violated, practical considerations may dictate a win-win situation for all the parties involved. This requires the court to be very creative and to develop existing public and private law remedies to protect the infringed rights.[121]

Exhausting the full potential of damages

As seen above,[122] the Constitutional Court has been cognisant of the fact that damages awards may deplete the already strapped state resources. In socio-economic rights terms, for instance, damages may be fatal because they direct monies that would have been used for the common good into the pockets of the very few who make it to court. Rather than place money in the pockets of individuals, it may be wise to adopt remedies with broader social benefits, such as interdicts.[123] I do subscribe to the submission that when funds are limited, it may make more sense to require that any available money be used directly to improve the conditions which caused the problems and which may potentially continue to give rise to future wrongs. This approach is preferable to repaying a particular victim who has had the resources

118 As above.
119 A Christmas 'Property rights of landowners vs socio-economic rights of occupiers' (2004) 5 *ESR Review* 13.
120 Van der Walt (n 19 above) 150.
121 For a detailed discussion of this case, see also A Pillay 'Access to land and housing' (2007) 3 *International Journal of Constitutional Law* 544.
122 Sec 5.3.1.
123 Shelton (n 47 above) 79.

and power to bring and win a law suit. In the *Fose* case, the Constitutional Court took note of the effect that resource scarcity has on the selection of remedies. According to the Court, where there are multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform, it seems to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are readily compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventive effect.[124]

It could be argued that the award of substantial punitive damages against government may induce change. Nonetheless, as mentioned above, it is also true that other remedies such as interdicts may lead to such change without substantial cost on the part of the state.[125] This does not mean, though, that the award of damages should be ruled out completely as means of redressing systemic violations. The award of damages could still be used in creative ways that eliminate systemic violations and lead to structural reforms.

There is therefore a need for the Constitutional Court to be more creative and to explore the full potential of damages to advance the notion of distributive justice. In socio-economic rights litigation it may be possible for damages awards to be channelled to causes that advance the realisation of these rights without necessarily putting money in the pockets of individuals.[126] The Court has been urged to explore the possibility of awarding what has been described as preventive damages in order to counter widespread and persistent violations.[127] Preventive damages are damages awards that should go not to the individual victim, but to bodies carrying out activities designed to deter future infringements of specific rights.[128] The

[124] *Fose* case (n 99 above) para 72. See also K Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in Berryman (n 47 above) 32.

[125] C Whitman 'Constitutional torts' (1980) 79 *Michigan Law Review* 5 50, as quoted by M Pilkington 'Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms' (1984) *Canadian Bar Review* 517 539. See also *Rail Commuters* case (n 51 above) para 81.

[126] See Trengrove (n 85 above).

[127] H Varney 'Forging new tools: A note on *Fose v Minister of Safety and Security* CCT 14/96' (1998) 14 *South African Journal on Human Rights* 336 343.

[128] Indeed, parliament has seen the relevance of this form of relief and made provision for it as one of the remedies that could be granted under the Promotion of Equality and Prevention of Unfair Discrimination Act 2000; see sec 21(2)(e) of this Act.

award should be accompanied by directions to such bodies to use the damages in stepping up their activities in the affected area.[129]

Such damages, it is contended, 'would not be determined or calculated by the extent of the infringement or suffering of the victim but by the cost of deterrence'.[130] This would require evidence on the likely contribution of the award in ending the infringement. This could be based on the nature of the identified organisation and the intended outcomes of its activities. This is in addition to the funding needs of such an organisation. There should be proof that the organisation is engaged in activities aimed at ending the violation. This is in addition to evidence that the funds arising from the damages award will be used for activities that advance the object of ending the violation. The organisation receiving the award may be required by the court to report on how the monies are being used in preventing future infringements.[131]

In socio-economic rights litigation, preventive damages would serve a good purpose when directed at causes that advance provision of the denied goods and services to society as a whole, without targeting specific individuals. Consider, for instance, a case of a violation of the right of access to adequate housing. Substantial preventive damages could be directed towards organisations that assist homeless people to get access to housing, or those that provide humanitarian assistance to the victims of disaster. This is in addition to organisations that engage in advocacy and research activities aimed at promoting the rights. In awarding such damages, however, care should be taken to ensure that it does not interfere with the budgetary plans of government, which may lead to delay in delivering socio-economic services. Nonetheless, where the damages are well-directed and properly applied, they will go a long way in enhancing the delivery of socio-economic goods and services.

5.3.2 Declarations

Nature and purpose of declarations

A declaratory order is a legal statement of the legal relationship

[129] Varney (n 127 above) 343. Varney has submitted that such awards would be appropriate in cases where independent bodies have joined the complaint as *amici curiae* and where they set out the details of the proposed relief. However, in my opinion, the organisation to which the award is made need not have been *amicus curiae* in the case. It could be one that is suggested either by the parties or appointed by the court, and one which has agreed to use the award to realise the above objective.

[130] Varney (n 127 above) 343.

[131] Varney (n 127 above) 344.

between the parties.[132] It is primarily used to declare whether or not a particular decision or conduct is a nullity.[133] This is in addition to determining the scope of public powers and the obligations and the ambit of the rights protected by the law. The Constitution explicitly mandates courts to issue orders of declarations of rights;[134] it allows persons listed as having *locus standi* to seek declarations of rights from the courts.[135] The courts are also obliged to declare as invalid any law or conduct that is inconsistent with the Constitution.[136] Declaratory orders are traceable as a common law remedy predating the Constitution; they serve the role of clarifying legal and constitutional obligations. Such clarification helps to enforce the constitution and the values upon which the constitution is based.[137]

A declaratory order is the most commonly and widely used non-intrusive remedy used by the courts to pronounce on legal rights and their infringement. The non-intrusive nature of a declaratory order arises from the fact that it does not give directions as to how a violation should be remedied. It leaves it to the state to determine how, and when to remedy the violation.[138] This flexibility contributes to an appropriate institutional division of labour between the courts and government.[139] By making declaratory orders, courts signal respect and show due deference to the executive and legislative branches of the state. In the *Rail Commuters* case, the Constitutional Court underscored the value of declaratory relief in a constitutional democracy: It enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.[140]

In this respect, declaratory orders can be very effective, especially in those cases where there are several ways available to the state for remedying the violation. The court thus saves itself from the agonising task of having to assess the pros and cons of each option, and passes this task on to the state. This is a task which may require consideration of political factors which are often beyond the easy comprehension of the court.

132 G Aldous & J Alder *Application for judicial review: Law and practice of the Crown Office* (1993) 66.
133 C Lewis *Judicial remedies in public law* (1992) 174.
134 Sec 38.
135 Sec 38 of the Constitution provides that the following persons may approach the courts for a declaration of violation of rights: (a) anyone acting in their own interests; (b) anyone acting on behalf of another person; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interests of its members.
136 Sec 172(1)(a) of the Constitution.
137 *Rail Commuters* case (n 51 above) para 107.
138 Shelton (n 47 above) 55.
139 Roach (n 42 above) 12-2.
140 Para 107.

Declaratory orders provide the government with adequate guidance about the standards that ought to be maintained to comply with the constitution. They are therefore very useful in those cases where the violation of rights arises from mere inattentiveness to the constitutional standards, sometimes on the pretext of (or actual) lack of clarity. Clarity of the legal standards will expose any violation that may have occurred thereby compelling government to fix it.[141] Declarations have also proved very effective in cases where a violation has not yet occurred but there is a threat of it occurring. This is especially so in cases where the threat of infringement arises from uncertainty about the law.[142] The litigant need not prove that a right has been violated, and there is no need to prove that actual harm has been suffered as a consequence.[143] All that a litigant has to prove is that his or her fear is not hypothetical but is based on a reasonable apprehension of harm. It is also not necessary to demonstrate who exactly would suffer as a result of the violation: 'As long as there is reason to believe that the declaration could prevent future … violation, the court should consider issuing declaratory relief.'[144]

It is important to note, however, that while declaratory relief should not be prescriptive as regards the options that are available to the state in remedying the violation, it should be crafted in a manner that clarifies all the legal uncertainties. Where the obligation to remedy the violation falls on more than one person, it is important that what has to be done by every person to remedy the violation be detailed in clear and certain terms. This is very important in contexts

141 See K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 346.

142 It may not be an effective remedy where the violation has already taken place and injury suffered. However, a declaration is also appropriate to past violations where there is no longer a feasible remedy available. In *President of RSA v Hugo* 1998 2 SA 363 (CC); 1997 6 BCLR 708 (CC), Kriegler J dissented from the majority's conclusion that the pardon of convicted mothers and not fathers did not amount to unfair discrimination. The only remedy he considered appropriate was a declaration. There would indeed have been no other remedy because the pardon could not be reversed. Neither could the President be ordered to release fathers too, as this is a discretionary remedy. See I Currie & J de Waal *The Bill of Rights handbook* (2005) 214. However, such a declaration becomes most relevant in those cases where, though the violation has occurred, there is a likelihood of it occurring and victimising other people. Roach (n 42 above) 12-11 uses the Canadian case of *Howard v Stony Mountain* [1984] 2 FC 642 (CA) to back this submission. In this case, a declaration that inmates were entitled to legal representation during disciplinary hearings was made. This was despite the fact that the prisoner had already been convicted of a disciplinary offence and had served his sentence. The declaration was deemed useful to prevent disputes in the future. Applying this to Kriegler's decision, it could be submitted that, unless the President was given guidance, it was likely that he would exercise his powers of pardon in a discriminatory manner in future, to the prejudice of certain sections of society.

See schedules 4 & 5 of the Constitution

143 Roach (n 42 above) 12-5.

144 Roach (n 42 above) 12-8.

such as those where there are, for instance, several spheres of government that bear obligations similar to the ones under contestation. For example, in the South African context, the obligations to implement socio-economic rights are spread between national, provincial and local spheres of government.[145]

The failure to declare, in clear terms, the obligations of the different levels of government is one of the weaknesses cited in the declaratory order emanating from the *Grootboom* case. This failure is perceived as one of the reasons why the order has not effectively been implemented as regards the Grootboom community.[146] Pillay contends that, despite a clear allocation of roles in the Housing Act, the lack of specificity in the *Grootboom* order with regard to the allocation of responsibilities between the three spheres of government has been blamed for the discord and uncertainty among them with regard to their obligations under the Grootboom judgment.[147]

One could argue that it was not necessary for the Constitutional Court to be specific as regards the Grootboom community. The order applicable to the Grootboom community, as suggested by Pillay, had been made as an interlocutory one arising out of the settlements between the parties.[148] The final declaratory order was not intended by the Court to address the plight of the Grootboom community. Instead, the order was intended to have a distributive effect by addressing the general obligation of the state to ensure access to adequate housing under section 26(1) and (2). This is in addition to pronouncing on the duty to realise the children's rights in section 28. Since the Housing Act clearly sets out the obligations of the different levels of government, it was not necessary for the Court to pronounce on them as they were not in dispute. The different levels of government should therefore not have allowed themselves to be confused by the general order as regards the Grootboom community. They were already bound by the terms of the interlocutory order, and only bound by the general order as regards their obligations towards all South Africans. Yet the obligations of each sphere of government as regards the right of access to adequate housing are clearly detailed in the National Housing Act.[149]

145 See schedules 4 & 5 of the Constitution.
146 See generally K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* 225.
147 Pillay (n 146 above) 267.
148 Pillay (n 146 above) 264-265.
149 Act 107 of 1997. See secs 9 & 10.

Declaratory orders and the theory of distributive justice

It should be noted that there are several ways through which declaratory orders could promote the theory of distributive justice. It is true that a declaration will not be granted in respect of academic or hypothetical issues or where it would not serve any practical purpose.[150] However, unlike other forms of relief, such as damages awards, there is no need for injury to be proved before a declaratory order issues. This is distinguishable from the theory of corrective justice which, as discussed in chapter four,[151] puts much stress on the existence of an injury and liability in respect of such injury. Indeed, the applicant of a declaratory order need not even prove that he or she has a cause of action or that there is a dispute. In South Africa, for instance, section 19(1)(a)(i) of the Supreme Court Act[152] provides that a court may, at its discretion, and at the instance of any interested person, enquire into and determine any existing, future or contingent right or obligation. This is notwithstanding that such a person cannot claim any relief consequential upon the determination.

The importance of the above from the perspective of distributive justice is two-fold. First, it enables persons other than the victim of an actual or threatened violation to apply for relief in court. Such applicants may, in some cases, be persons that are acting in the public interest as contemplated by section 38(d) of the Constitution. Indeed, it is on the basis of section 19 of the Supreme Court Act that the courts have taken cognisance of the fact it is not necessary to have an interest in the outcome of a case challenging infringement of constitutional rights. The section has been construed as being very flexible in nature as regards the principles of *locus standi*.[153] Even where the applicant has lost interest in the outcome of the case during the course of the proceedings, the Constitutional Court has proceeded and made a declaration for the benefit of persons other than the applicant. The *Grootboom* case, as discussed above, is an example of such a scenario. The Constitutional Court proceeded and made a declaratory order in respect of the government's housing programme. This was regardless of the fact that the parties had reached a settlement leading to an interlocutory order.

Secondly, allowing persons that would not claim any relief consequential upon the determination makes it possible to obtain relief in respect of future or threatened infringement of rights. This

[150] Aldous & Alder (n 132 above) 68. See also *Gibb v Nedcor Limited* [1997] 12 BLLR 1580 (LC).
[151] See ch four sec 4.2.1.
[152] Act 59 of 1959.
[153] See *TAU v Minister of Agriculture and Land Affairs and Others* [2003] JOL 10697 (LCC) para 7. See also *Ferreira v Levin NO* 1996 1 SA 984 (CC).

is in circumstances where no remedy would be obtainable under the corrective justice theory. There is in fact no need on the part of the applicant to prove that there is an actual dispute.[154] This is a course that the corrective justice theory would not condone, as indicated in chapter four.[155] Due to its backward-looking nature, corrective justice deals with past events and from which actual injury has arisen.

Declaratory orders also embrace the remedial flexibility which the notion of distributive justice demands. They allow the courts, in their own words, to identify and particularise what may be objectionable in legal terms and the measures that ought to be taken to remedy the infringement. Ancillary to this is the fact that, given their flexibility, declaratory orders are not closed as regards the situations in which they may issue.[156] This is a remedy that is open to court in all situations and is not constrained by the principles of the substantive law in issue.

The above, though, does not mean that declaratory relief provides the redress necessary for all violations in all contexts. The biggest shortcoming of declaratory orders is the enforcement problems associated with them. It has been submitted that, in practice, there is no difference today between declaratory judgments and interdicts because they are both effective.[157] However, this is not true because failure to comply with an interdict will attract penalties, including orders of contempt of court. In contrast, a failure to comply with a declaratory order does not attract such a penalty. Indeed, a declaratory order have been defined as a non-constitutive remedy: 'It records only existing legal rights and cannot change the legal position in any way.'[158] The courts have in fact held that no execution can issue as arising from a declaratory order.[159] Although, as suggested by Wells and Eaton,[160] the holder of a declaratory order could still go back to court and seek injunctive relief, what will be enforced then is the injunctive order and not the declaration. What this brings to

[154] In *Ex Parte Nell* 1963 1 SA 754 (A), the Appellate Division held that an existing dispute was not a prerequisite for the exercise by the Court of its discretion to make a declaratory order. According to the Court, a declaratory order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by one or all of them (759G-H in translation).

[155] Sec 4.2.1.

[156] Lewis (n 133 above) 177.

[157] See Wells & Eaton (n 72 above) 186.

[158] Aldous & Alder (n 132 above) 66. However, it is important to note that this may not be true in respect of the declaration of invalidity provided for under sec 172(1)(a) which must be granted whenever legislation or conduct is found to be inconsistent with the Constitution. The effect of this declaration, unlike its common law counterpart under consideration, is that it nullifies conduct or legislation.

[159] See *Burman and Others v Davis* (1920) 41 NPD 273.

[160] Wells & Eaton (n 72 above) 186.

light, therefore, is that, where there is evidence that a government will not comply, in good faith, with a declaratory order, the court would be well advised to issue a mandatory interdict instead of a declaratory order.[161]

Hence, declaratory orders are only successful against states that are committed to the rule of law,[162] and therefore responsive to the decisions of the courts. It is because of such responsiveness that declaratory judgments have found favour with the European Court of Human Rights[163] and with Canadian courts. In Canada, a constitutional convention has developed by which the government has responded positively to the directions of the courts.[164] This is in contrast with the United States where preference for declaratory relief broke down because of the resistance exhibited by some states, especially in the school desegregation cases, but also in many civil rights cases. The courts were left with no option but to use the interdict and to invoke contempt of court citations in order to induce change.[165] In contrast, the Canadian experience, even in cases with evidence of non-compliance, the courts have been very reluctant to move beyond declaratory relief. This is because of the high degree of judicial deference that the courts accord to the other organs of state owing to separation of powers based concerns. In Mahe v Alberta,[166] for instance, the Canadian Supreme Court observed that once the Court has declared what is required, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under the Charter: 'To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme.'[167]

However, in those cases where it is clear that the state would not comply with the court orders in good faith; the Canadian courts have combined declaratory with mandatory relief. An example of such case is *Marchand v Simcoe County Board of Education*.[168] Convinced that the defendant board continued to demonstrate a negative attitude towards the plaintiff's minority language rights,[169] the Court

161 Roach (n 42 above) 3-24 12-5.
162 Shelton (n 47 above) 199. See also Roach (n 15 above) 113.
163 Shelton (n 47 above) 201. There is evidence that in the overwhelming majority of cases, states have reported to the Council of Ministers of the European Union on positive steps they have taken to remedy the violations highlighted in the declaratory judgments.
164 Roach (n 42 above) 3-38 12-2. See also E Borchand *Declaratory judgments* (1941) 876.
165 See Roach (n 42 above) 12-1.
166 (1985) 22 DLR (4th) 24, 39 Alta LR (2d) 215 (Q.B.).
167 [1990] 1 SCR 342 (my emphasis).
168 (1989) 55 OR (2d) 638 (*Marchand* case).
169 660.

concluded that it was appropriate and just in the circumstances that 'there be a declaration … coupled with a mandatory interdict to implement the constitutional rights'.[170]

In the South African context, the government's response to court orders in some cases brings it very close to fitting the description of a recalcitrant government.[171] The recent decision regarding the rights of prisoners to access anti-retroviral drugs presents clear evidence of such recalcitrance.[172] While publicly proclaiming its willingness to abide by court orders,[173] there was evidence of foot dragging on the part of government in this case. This is irrespective of the fact that the court applied the most intrusive relief in the form of the structural interdict. This means that declaratory orders alone in this case would have gone unnoticed. The government was keen to exploit procedural, yet untenable legal technicalities, to delay the implementation of the orders of court by filing appeals in a serial manner.[174]

5.4 Conclusion

The inclination by South African courts toward the notion of distributive justice is an indication of the context in which the courts enforce human rights. Constitutional provisions, including those on socio-economic rights, cannot be construed outside the social, economic and political context in which the Constitution operates. The current South African context, characterised 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 wide societal interests that have to be considered which may dictate the negation of the individual interests of the litigant. This is where distributive justice becomes very useful in the remedial approach of the courts.

Criticisms of the failure of the remedies of the Constitutional Court to extend individualised entitlements in socio-economic rights

170 662.

171 See *South Africa justice sector and the rule of law*, Report by AfriMAP and Open Society Foundation for South Africa, sourced at http://www.soros.org/resources/articles_publications/publications/sajustice_20060223/afrimapreport_20060223.pdf (accessed 18 October 2006). This report discusses a number of cases where government has, in a recalcitrant manner, declined to implement court orders (29-31).

172 *EN and Others v Government of RSA and Others* 2007 1 BCLR 84 (D) (*Westville* case). See ch six sec 6.4 for a detailed discussion of this case.

173 See, eg, G Stolley 'Prisons dept reveals plan for Aids drugs' *Mail & Guardian* 11 September 2006.

174 See 'Westville ARV appeal a matter of principle' *Independent Online* 26 August 2006, available at http://www.iol.co.za/index.php?set_id=1&click_id=125&art_id=qw1156573982766B232 (accessed 2 March 2007).

litigation could wrongly be based on the perception of the corrective role of remedies. At a seminar held at the end of May in 2006,[175] 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,[176] stress the corrective role of litigation and negate its distributive justice effect. The Grootboom community may not have obtained the individual goods and services they demanded, yet the judgment has played a very important distributive role. Indeed, the Constitutional Court observed that the case was a reminder of the intolerable conditions under which many people were living and that the respondents were but a fraction of them.[177] What this called for was a judgment that would benefit similarly-situated people. This explains why the order was generally worded; it was addressed for the benefit of 'people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.[178] There is agreement by many scholars in the area of socio-economic rights that the *Grootboom* case has helped to positively influence policy and legislation to realise socio-economic rights.[179]

The *TAC* case is not much different. In this case, the government was ordered to remove the restrictions that prevented Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research and training sites.[180] The Constitutional Court observed, however, that the judgment did not mean that everyone could immediately claim access to Nevirapine treatment. All that the government had to do was to make every effort, as soon as was reasonably possible, to make the treatment available.[181]

As mentioned in chapter two,[182] while civil and political rights too have resource implications, socio-economic rights require far more resources. It could be submitted that even the economically resource-endowed nations are yet to realise all these rights. This is partly

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

176 See also M Cohen 'How supervisory jurisdiction can save socio-economic rights in South Africa' unpublished LLM dissertation, University of Cape Town, 2005 (on file with author) 20; and generally Swart (n 52 above).

177 Para 2.

178 Para 99(2)(b).

179 See S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 2 *Law, Democracy and Development* 159 177-180. See also Pillay (n 146 above) 256-257; and Budlender (n 54 above) 41.

180 Para 135(3)(a).

181 Para 125.

182 Sec 2.1.

because of the immense amounts of resources required to match the dynamic standards of human development. It would, therefore, be unrealistic to apply the ethos of corrective justice to socio-economic rights by demanding that successful litigants be put immediately in the position they would have been in but for the violation.

In South Africa, the inclination towards the theory of distributive justice is also reflected in the Constitutional Court's reluctance to award constitutional damages. Although damages present themselves as an attractive remedy to vindicate constitutional violations, they suffer from a number of defects. Damages paid to an individual will deprive the state of resources that would have been used to provide services for the general good of society as a whole. Consider a case where damages are paid to an individual after a finding that his housing rights have been violated. An order awarding compensatory damages would in effect require that enough be made available to build a house for that individual and punitive damages would take large amounts from the state in order to deter future violations of the same kind. These funds may be taken from an already existing general housing budget, thereby creating a deficit. This deficit, if substantial, will cripple the housing programme and delay the provision of housing to all members of society in need of it.[183]

Declaratory relief very well presents itself as appropriate in some circumstances and may promote distributive justice. Its strength lies in its deferential nature, which gives the state latitude to choose what it considers to be the most appropriate way of undoing a constitutional violation. This is very important in those cases where there are various equally effective ways of undoing a violation.[184] The court would very well save itself from the agonising task of having to make choice, which may sometimes require extra-legal considerations. However, as this chapter has demonstrated, the declaration is only effective if the government is committed to the rule of law and accords court orders the respect they deserve. The South African government is yet to prove itself as matching such a description. Recalcitrance towards court orders has been detected in a number of cases, which makes the declaration an inappropriate remedy in those cases. One should, therefore, explore the appropriateness of other remedies such as the interdict, as discussed in the next chapter.

[183] According to Pilkington (n 125 above) 540, rather than award damages in class actions, in which damages may be hard to assess for every individual, a court might think it appropriate to direct the expenditure of public funds to restructuring the institution so that future infringements will be avoided.

[184] See *Eldridge* case [1997] 3 SCR 624, 151 D.L.R. (4th) 577 para 96.

CHAPTER 6

THE STRUCTURAL INTERDICT: NATURE, ROLE AND APPROPRIATENESS

6.1 Introduction

This chapter discusses the interdict and particularly the structural interdict, especially as used in socio-economic rights litigation against government.[1] This form of relief has been reserved for detailed consideration in this chapter because it is a true reflection of the judicial flexibility required by the notion of distributive justice. This is in addition to the controversies that it has generated. The structural interdict has been used by the courts in a manner that goes against traditional perceptions of the role of the courts as envisioned under the theory of corrective justice. It has enabled judges to discard their position as mere umpires and to assume positions which make them active participants in the dispute. The courts have made not only extensive judicial decrees, but have also overseen their implementation. This has generated much controversy and objection to the structural interdict as an appropriate relief. This is because it forces courts to do things that they are ordinarily not expected to do.

This chapter delineates the circumstances under which grant of a structural interdict may be considered appropriate. The approach of the South African courts towards this form of relief, especially in socio-economic rights litigation, is discussed. The approaches of the High Court,[2] on one hand, and the Constitutional Court, on the other, have differed markedly. The High Court has readily availed itself of this remedy while the Constitutional Court has emphasised the need to defer to the executive and legislative branches and not to get embroiled in what it considers to be policy issues.[3] In spite of this, the

1 Some of the materials in this section have been published in the *South African Journal on Human Rights*. See C Mbazira 'From ambivalence to certainty: Norms and principles for structural interdicts in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* (forthcoming).

2 In this chapter, I use the term High Court to describe all the provincial divisions of the High Court as I deem all these divisions to be part of a single level with in the judicial hierarchy.

3 D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 304.

Constitutional Court has used the structural interdict in a number of cases. What is clear, however, is that all these cases deal with the enforcement of civil and political rights. The reluctance to use the structural interdict by the Constitutional Court in socio-economic rights cases reflects the cautiousness with which the Court has enforced these rights. As a result, the Constitutional Court's approach to the structural interdict is ambivalent and lacks clear norms and principles.

This chapter gives an exposition of some of the norms and principles that could guide the courts in deciding whether or not a structural interdict is appropriate in a specific case dealing with socio-economic rights. The norms and principles could also guide the courts on how to proceed should they deem a structural interdict appropriate. The structural interdict should be used as of last resort, and when used, should be used with flexibility and in a graduated manner which also ensures participation of all the affected stakeholders. In addition, reasoned decision making should be preserved, and remediation and protection of the substantive norms should be promoted as much as possible. Furthermore, courts should ensure that they maintain their independence and impartiality.

The chapter is divided into five sections. The first section prefaces the discussion of the structural interdict with a discussion of the general interdict as a remedy in constitutional litigation. This section is followed by a discussion of the nature of the structural interdict and the different forms it could take. The third section discusses the arguments that have been advanced both to support and to oppose the structural interdict. The opposition is based both on separation of powers and corrective justice-type arguments. The fourth section discuses the approach of the South African courts in using the structural interdict as 'appropriate, just and equitable relief'. The last section is dedicated to a discussion of the norms and principles that could guide the courts in determining when a structural interdict is appropriate.

6.2 The interdict as a constitutional remedy

The interdict is an order of the court requiring the person to whom it is directed to do or to refrain from doing a particular thing.[4] The interdict can be used both as relief for those whose rights have been violated and as a remedy to deter violations of a similar nature in future. The interdict was initially developed exclusively as a remedy to protect private property. Later, however, it evolved into an

[4] See T Jones & H Buckle *The civil practice of the magistrates' courts in South Africa* (1988-1991) 87; and J Berryman *The law of equitable remedies* (2000) 12.

instrument for the protection of commercial interests other than property.[5] These interests, for instance, included confidential business information, technology and production techniques, copyrights and patents. The interdict now finds its way into all kinds of litigation and has found scope for application in such fields as labour and industrial relations, protection of privacy, intellectual property, electronic data and protection of human rights, among others.

Historically, the interdict has been used as a remedy of last resort, used only when other remedies are considered inadequate. In procedural terms, this means that the plaintiff would be granted an interdict only if there is no other common law remedy capable of adequately repairing the injury.[6] It should be noted, however, that there are not many remedies that provide an alternative to the interdict other than damages. Remedies such as restitution and rectification still harbour some elements of injunctive relief and derive from equity, the same source for the interdict.[7]

In South Africa, the interdict or injunction finds its source principally in the Roman-Dutch law. Nonetheless, the law on interdicts has also been influenced to a great extent by English law, and particularly by the English law principles of equity.[8] The conditions for the grant of an interdict in South Africa were made clear in *Setlogelo v Setlogelo*:[9] There must be a clear right,[10] injury

5 J Cassels 'An inconvenient balance: The interdict as a Charter remedy' in J Berryman (ed) *Remedies, issues and perspectives* (1991) 72.

6 O Fiss *The civil rights interdict* (1978) 38.

7 The only problem, as seen in ch five sec 5.3.1, is that the appropriateness of damages in some cases is doubtful. This raises questions about the appropriateness of placing the interdict at the bottom of the remedy hierarchy as has been the common law practice. It also explains why public law has embraced the interdict as a tool of first resort where appropriate. See K Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in Berryman (n 5 above) 22. In the United States, eg, this transplant can be traced to the 1894 *Debs* case arising from disruption of rail services by striking workers demanding better working conditions. The Supreme Court parted with the tradition that the interdict was only available as a measure of last resort. The Court issued an interdict preventing the leaders of the strike from 'compelling or inducing by threats, intimidation, persuasion, force or violence, railway employees to refuse or fail to perform duties'. This was motivated both by the need to protect the commercial interests of the rail operator and the need to make public transport available. An award of damages would not have protected these interests. It would have protected the interests of the rail operator but not the public interest of having public transport.

8 B Prest *The law and practice of interdicts* (1996) 9 28. See also *Struben & Others v Cape Town District Waterworks Co* (1892) 9 SC 68, as discussed by Prest 30.

9 1914 AD 221 (*Setlogelo* case). An excerpt of this decision is available in A van der Walt *Law of property casebook for students* (2002) 257-258.

10 See *Nienaber v Stuckey* 1946 AD 1049 and *Bankorp Trust Bpk v Pienaar* 1993 4 SA 215 (N). It has been submitted by Prest (n 8 above) 43 that the existence of a right is a matter of substantive law and that whether that right is clearly established is a matter of evidence. This requires proof by the plaintiff, on a balance of probability, of the right which he seeks to protect.

actually committed or apprehended, and the absence of similar protection by any other ordinary remedy.[11] Additionally, it has also been held that the grant or refusal of an interdict is a matter within the discretion of the court and depends on the facts of each case and the right being enforced.[12] The other requirement is that the applicant for an interdict must have *locus standi* in accordance with the civil procedure law.[13] However, this rule does not appear to have application in respect of enforcement of the rights in the Bill of Rights. As mentioned in chapter five,[14] *locus standi,* as regards Bill of Rights litigation, is governed by section 38 of the Constitution. This section gives *locus* to persons who would not otherwise have had it under civil procedure law.[15] Just as in the case of the declaratory order, this enables persons other than the direct victims of an infringement of a right to seek relief in the form of an interdict. In fact, the first socio-economic rights case in which the Constitutional Court issued a mandatory interdict was brought to the Court by persons who were themselves not direct victims of the infringement of the right of access to health care services.[16]

The power of the courts to follow up injunctive orders with contempt of court sanctions has enhanced the power of the interdict as a deterrent remedy.[17] Failure to comply with an interdict could attract sanctions ranging from mere warnings to orders that the

11 *Setlogelo* case (n 9 above) 227. See *Fourie v Uys* 1957 2 SA 125 (C), where it was held that a court will not grant an interdict when an applicant can obtain adequate redress by an award of damages (128). See also *SAPU and Another v National Commissioner, SAPS and Another* [2005] JOL 16030 (LC). The basis for the requirement that the interdict will be granted only if there is no other remedy is that the interdict is a very drastic remedy which ought to be granted only in deserving cases. See Prest (n 8 above) 45.

12 See *Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd* 1992 2 SA 459 (C) (*Candid* case).

13 L Harms 'Interdicts' in W Joubert & J Faris (eds) *The law of South Africa* (1998) 287.

14 Sec 5.3.2.

15 See *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E); *Ferreira v Levin NO* 1996 1 SA 984 (CC).

16 See *Minister of Health and Others v Treatment Action Campaign* 2002 5 SA 721 (CC).

17 See *Kate v MEC Department of Welfare, Eastern Cape* [2005] 1 All SA 745; *Mahambehelala v MEC Department of Welfare, Eastern Cape* 2002 1 SA 342 (SE); and *Mbanga v MEC for Welfare, Eastern Cape* 2002 1 SA 359.

defendant be imprisoned until he or she assures the judge of his or her intention to comply.[18] Indeed, contempt of court, even arising from a civil case, is treated as a criminal offence.[19] This is what makes injunctive relief far more powerful than declaratory relief as contempt sanctions cannot issue in respect of the latter.[20]

6.2.1 Types of interdicts and appropriateness in socio-economic rights litigation

There are two broad types of interdicts: prohibitory interdicts, on one hand, and mandatory (sometimes called reparative) interdicts, on the other. Both the prohibitory and mandatory interdict can be issued either as perpetual or as interim interdicts (interlocutory).[21] The perpetual interdict is the final order of the court and is deemed to signal the final determination of the issues in the case. In contrast, the interim interdict is issued to protect the interests of the applicant by maintaining th*e status quo* pending the final determination of the case. The distinction between the perpetual and the interim interdict is very important because the prerequisites for issuing the two differ.[22] The requirements enumerated above apply to the perpetual interdict.[23]

Prohibitory interdicts

A prohibitory interdict is negative in form: It prohibits the person(s) to whom it is directed from doing something proclaimed as a violation.[24] Its role is therefore to proscribe what may be considered

18 Fiss (n 6 above) 76. Fiss has elevated the interdict above criminal rules as a deterrent on the basis of what he calls its individuated nature. He contends that, while a criminal liability rule is directed to the general public, the interdict is directed at a specific person. The individuated nature of the interdict also contributes to the higher degree of its specificity and proper specification of the intended beneficiaries. This makes compliance much easier in comparison to a criminal liability rule (12). He also submits that the interdict puts to rest fears of potential victims in comparison to compensatory relief. While a potential victim will know that he will get compensation once a wrong is committed on him or her, he or she still lives with the fear that the compensation may not be adequate. Fiss adds that yet, the guarantee of compensation does not still allay the fear of being a victim. Interdicts allay these fears because one will know that the possibility of being a victim has been allayed.

19 *S v Beyers* 1968 3 SA 70 (A).

20 See ch five sec 5.3.2.

21 See *Jordan v Penmill Investments CC* 19912 SA 430 (E) 436D.

22 Jones & Buckle (n 4 above) 89.

23 The interim interdict will be discussed in detail in this section because of its importance in protecting human rights.

24 The prohibitory interdict has been granted in a variety of contexts and for a variety of reasons to prohibit the commission of a delict, to restrain interference with a property owner's right of enjoyment, to restrain the breach of a statutory provision, to restrain the infringement of a copy right, to restrain the passing on of trade secrets and to restrain acts of family violence, amongst others. See Jones & Buckle (n 4 above) 91.

unlawful conduct. In socio-economic rights cases, the prohibitory interdict is most appropriate as a remedy for infringements of the negative obligations that these rights give rise to. It could be obtained to stop either the government, or any other person, from taking away the existing socio-economic rights vested in the applicants and similarly situated people. The prohibitive interdict is also very effective in preventing future infringements where the plaintiff shows a likelihood of violating protected rights. In this case, it becomes a preventative interdict. For this type of interdict to be granted, the plaintiff must show a reasonable apprehension of injury. This is apprehension a reasonable man might entertain on being faced with the facts. The test is objective and the applicant need not prove on a balance of probability that injury will follow.[25] However, the apprehension must be induced by some action of the respondent or authorised to be performed by his or her agent or servant.[26]

The distinction between the prohibitory and mandatory interdict appears to be of no practical value. In fact, the prerequisites for the issuance of the two are the same. However, the importance of the distinction lies in the manner of enforcement of each of them.[27] This is because the prohibitory interdict does not require the state to undertake any positive action; it involves less costs to the defendant, fewer problems with supervision and is easier to formulate.[28] All the court has to do is to pronounce that the government or other defendant should not engage in certain activities. For this reason, the prohibitory interdict is considered to be less intrusive in separation of powers terms.

Mandatory interdicts

A mandatory interdict is expressed in positive terms: It requires the person to whom it is directed to undertake positive steps to remedy a wrongful state of affairs for which he or she is responsible. It could also require such person to do something which he or she ought to do if the complainant is to enjoy his or her rights.[29] The mandatory interdict is appropriate as a means of enforcing both the negative and positive obligations engendered by socio-economic rights. But what

25 Harms (n 13 above) 289. This should be distinguished with the approach of the Canadian courts which requires the plaintiff to prove that there is *a strong probability,* upon the facts, that *grave damage* will accrue from the violation. See *Operation Dismantle Inc v Canada* [1985] 1 SCR 441. However, 'strong probability' and 'grave damage' appear to put the requirements at an unreasonably high level. It should be enough that the contemplated harm amounts to violation of the constitution and is based on reasonable apprehension.

26 Jones & Buckle (n 4 above) 94.

27 Harms (n 13 above) 286.

28 Berryman (n 4 above) 40.

29 Jones & Buckle (n 4 above) 90. See also *Sikuza v Minister of Water Affairs and Agriculture and Another* [2001] JOL 8486 (Tk) 2.

has made the mandatory interdict most suited for the enforcement of socio-economic rights is its potential to enforce positive obligations. This is because in the majority of socio-economic rights cases the emphasis is always more on ensuring compliance with the obligations in the future than on repairing past wrongs.[30] In such cases, what are needed are those remedies that have an affirmative element and which can be used to demand positive provision of socio-economic goods and services.

The mandatory interdict could also pass as a corrective remedy when it is aimed at correcting past wrongs, thereby becoming a reparative interdict which compels the defendant to repair a wrong.[31] Such compulsion is also deterrent as it becomes clear to the defendant that if he or she engages in wrongful conduct in the future, he or she will be compelled to undo the wrong. So are other potential defendants who, though not party to the suit, will be deterred once they become aware of the courts' powers of compulsion.[32]

It would not be appropriate to award a mandatory interdict where there is evidence that the state will respond positively, in good faith, to the orders of the court. In such cases, as seen in chapter five,[33] a declaratory judgment would suffice.[34] But where there is evidence of likely non-compliance, it would be appropriate for the court to make a mandatory interdict. This could be in the case where a government official, for instance, states on public television that the government

30 K Roach 'Crafting remedies for violations of economic, social and cultural rights' in J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 111. See also ch two sec 2.2.1.

31 K Roach *Constitutional remedies in Canada* (1994) 13-20.

32 See Fiss (n 6 above) 33.

33 Sec 5.2.2.

34 This is because the mandatory interdict is said to be more intrusive as it compels the state to act and involves displacement of the state's judgment for that of the court. It should therefore be avoided if this is possible. See Cooper-Stephenson (n 7 above) 35. In the Canadian case of *Société des Acadiens* v *Association of Parents* [1986] 1 SCR 549 (*Société des Acadiens* case); (1984) 8 DLR (4th) 238 (1983), 48 NBR (2d) 361, with evidence that the state was likely to comply with the court orders in good faith, the Supreme Court of Canada was reluctant to award a mandatory interdict. The Court held that, considering the impression given off by the character of the defendant throughout the trial, and in light of all the testimony, the Court was convinced that it was not necessary to order a mandatory interdict: 'Put simply, the Court is confident that this decision will be respected by the defendant' (1983) 48 NBR (2d) 409). In spite of this, however, the Court deemed it necessary to retain jurisdiction over the case and remain open to the parties. This proved very useful at a future stage because the state did not honour its promise to implement the order in good faith, which compelled the Court to deploy the mandatory interdict at a latter stage.

is not prepared to abide by any order against it in a pending case compelling government to provide Nevirapine.[35]

The Constitutional Court has asserted its powers to grant mandatory interdicts as part of 'appropriate, just and equitable relief'. The Court has rejected submissions that the only order it can make against the government in constitutional litigation is a declaratory order. It had been submitted that the Court was prevented by the doctrine of separation of powers from granting a mandatory interdict as this would amount to requiring the executive to pursue a particular policy.[36] According to the Constitutional Court, there is no distinction between a mandatory order and a declaratory order because they both affect state policy and may have budgetary implications. This is because the government is constitutionally bound to give effect to both mandatory and declaratory orders.[37]

I do endorse the holding that government is constitutionally bound to carry out declaratory orders in the same way as mandatory orders. In my opinion, however, the distinction between declaratory and mandatory order becomes clear when government disregards its constitutional obligations. As mentioned in chapter five,[38] declaratory orders once disobeyed cannot be enforced in the same way as the interdict. The interdict can be followed by contempt of court proceedings to secure compliance from the state. This explains why it was easy for those dissatisfied with the implementation of the *TAC* case order in some provinces to secure compliance.[39] This should be contrasted with the position of those dissatisfied with the implementation of the judgment in *Government of the Republic of South Africa v Grootboom and Others*[40] (*Grootboom* case) whose only

35 This was the situation in the *TAC* case where the minister of health stated, on public television, that the government would not abide by the judgment of the Court. See D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for a future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1 23-24. Though at the end of the case evidence had emerged that the government was prepared to abide by the judgment, the commitment was too fluid to merit a declaratory order alone. The Constitutional Court therefore made a mandatory order, compelling the government to remove, without delay, the restrictions that prevented Nevirapine from being made available at public hospitals and clinics that had not been designated research and training sites. Indeed, subsequent events proved the usefulness of the mandatory interdict as some provinces had to be threatened with contempt of court order citations to extract an undertaking from them to abide by the order. See *TAC v MEC for Health, Mpumalanga and Minister of Health* TPD Case 35272/02 (unreported) (*TAC* Mpumalanga case). See also M Heywood 'Contempt or compliance? The *TAC* case after the Constitutional Court judgment' (2003) 4 *ESR Review* 7.

36 *TAC* case paras 97-98.

37 *TAC* case para 99.

38 Sec 5.3.2.

39 See *TAC Mpumalanga* case (n 35 above) and Heywood (n 35 above).

40 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

access to the Court is through fresh litigation.[41] It therefore remains that the power of a mandatory order cannot be compared to that of a declaratory order.

Interim interdicts

The interdict has gained prominence as an interim remedy because of the impossibility of using the traditional public law remedies as a means of interim relief. In this respect, the interim interdict, granted on an interim basis, becomes handy. The interim interdict can be granted at any time of the proceedings if the circumstances warrant. It can even be granted without notice to the defendant.[42] The interim interdict, just as other interlocutory remedies, provides one possible way to combine individual and distributive or systemic relief.[43] The interim interdict can be used to accord individual protection to litigants in the case while seeking a remedy that may have a distributive effect as the final order of the case. However, this can only be done with respect to protection against negative and not positive violations. It is easily available in those cases where the applicants, for instance, require that the government be restrained from taking away an existing right until a final decision is made. An example is an order sought in an eviction case to maintain the *status quo* and prevent irreparable harm that would result from the eviction. This, though, does not mean that there could be no circumstances under which an interim order can be made to compel affirmative action such as the interim provision of services.

For an interim interdict to be granted in South Africa, a litigant must prove the following:

> (a) that the right which is the subject matter of the main action and which he/she seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to doubt;
>
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he[/she] ultimately succeeds in establishing his/[her] rights;
>
> (c) that the balance of convenience favours the granting of interim relief; and

41 See D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 150.

42 Berryman (n 4 above) 13. He also associates the popularity of the interim interdict to the ability to get a preliminary trial of the disputed merits which may assist in reaching a settlement before the case goes to trial.

43 Roach (n 30 above) 121.

(d) that the applicant has no other satisfactory remedy.[44]

The right that the applicant for an interim interdict seeks to enforce need not be shown on a balance of probabilities.[45] All that a court has to do is to consider the facts as set out by the applicant together with any facts set out by the respondent. If, with regard to the inherent probabilities, the applicant would obtain final relief, then a *prima facie* case would have been proved.[46]

Proving whether the balance of convenience is in the applicant's favour requires the court to weigh the applicant's interests against those of the defendant. The court must weigh the prejudice that the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is. If there is greater possible prejudice to the respondent, the interdict will be refused.[47] However, one of the factors to consider in the balancing process is the prospects of success in the main action. 'The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the balance of convenience to favour him[/her].'[48] As with irreparable harm, third party interests too may have to be weighed in the balance of convenience. The court should focus beyond the interests of the parties in order to be able to consider not only the polycentric case but also the interest that society as a whole may have in the case.

Traditionally, irreparable harm has been considered as harm that cannot be repaired with an award of damages. However, as submitted in chapter five,[49] the inherent nature of human rights and the intrinsic values they protect cannot be compensated for with damages.[50] Indeed, it has been held that if the applicant can establish

44 See *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 (C) 267A-F. See also *The National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 2 SA 715 (CC).

45 Prest (n 8 above) 52.

46 Joubert & Faris (n 13 above) 292. This is 'based on the unreliability of making determinations on 'conflicting … evidence of substantive claims without the benefit of detailed argument and in a climate of judicial haste'. Berryman (n 4 above) 22 49.

47 Prest (n 8 above) 72. See also *Eriksen Motors (Welkom) Ltd v Protea Motors and Another* 1973 3 SA 685 (A).

48 Jones & Buckle (n 4 above) 98.

49 Sec 5.3.1.

50 Damages may not be equated to human dignity, to a lost opportunity to worship one's God, or to a missed opportunity to vote. See *Dikoko v Mokhatla* 2007 1 BCLR 1 (CC) (*Mokhatla* case) para 109. On this basis, one could submit that the requirement of proving that irreparable harm would be suffered where human rights are involved is not necessary.

a clear right, there is no need to prove that irreparable harm would result if the interim interdict is not granted.[51] It is only when the right is open to some doubt that irreparable harm would have to be proved.[52]

It is important that the requirements for the grant of an interim interdict be relaxed in human rights litigation in order to give these rights their full effect. In socio-economic rights litigation, for instance, it may be necessary to apply the balance of convenience in a way that is different from other forms of litigations. Due to the polycentric nature of socio-economic rights litigation[53] and the need to engage in interest balancing,[54] it may be necessary to assess harm, not only to the petitioners but to third parties as well. Such relaxation, as has been done, is consistent with the theory of distributive justice.

As can be seen in the case of *Occupiers of 15 Olivia Road and Others v City of Johannesburg and Others* (*Olivia* case),[55] interim interdicts could play a very important role in providing interim relief resulting in a final remedy. This case was instituted by occupants of two 'bad buildings' in the inner city of Johannesburg to resist an eviction pursuant to an eviction order issued under the National Building Regulations and Building Standards Act. The basis of the eviction, according to the City, was that the buildings were in a sorry state; the buildings were considered to be fire hazards. This is in addition to a lack of proper hygiene, which posed a health hazard to the occupants and the neighbourhood. The applicants resisted the eviction on the grounds that no satisfactory alternative accommodation had been offered before the eviction. This is in addition to the failure of the City to consult with them. At the hearing, the applicants also argued that the City was partly responsible for the sorry state of the buildings.

The City had disconnected the water supply and yet had not done anything to make the buildings less hazardous in terms of hygiene and fire. The applicants sought an interim order to compel the City to restore the water supply and make the buildings less hazardous. In response, the Constitutional Court ordered the parties to engage with each other meaningfully in an effort to resolve the differences and

51 *Setlogelo* case (n 9 above) 227. This is where South African law differs from English law. Under English law, irreparable harm would have to be proved irrespective of the nature of the right. See *American Cyanamid v Ethicon* [1975] 2 WLR 316 (*American Cyanamid* case).

52 *Setlogelo* case (n 9 above) 227.

53 Ch two sec 2.4.

54 Ch four secs 4.2.2 & 4.3.

55 2008 5 BCLR 475 (CC). For a summary of the history of this case, see L Chenwi & S Liebenberg 'The constitutional protection of those facing eviction from bad buildings' (2008) 9(1) *ESR Review* 12.

difficulties aired in the application. In what could be described as 'an interim structural order', the Court issued a report-back-to-court order requiring the City to file affidavits on a stipulated date reporting on the results of the engagement with the applicants.[56]

The Court justified the forced engagement on the basis of the advantages of resolving disputes amicably. This is in addition to the constitutional obligations imposed on the City, as a public institution, to engage vulnerable people before making decisions that adversely affected them.[57] The court order was heeded by the parties, who engaged each other resulting in an agreement on interim measures. By this agreement, the City undertook to render the buildings safer and more habitable. Most importantly, the agreement has not been mere rhetoric, but has resulted in tangible positive results for the applicants. The legal representatives of the applicants recently indicated satisfaction with the implementation of the order arising from the settlement. The 450 residents have voluntary been moved by the City to more decent housing.[58] It has also been indicated that the new residences are more decent; they have water, electricity and sanitation facilities.[59] The conclusion of this case could be described as a big success for advocates of housing rights in South Africa.

6.3 Nature, functions and models of the structural interdict

The structural interdict is a complicated form of interdict. It involves continued participation of the court in the implementation of its orders. The functions of the structural interdict are various and determined by the circumstances and demands of each case. Unlike other forms of interdicts or remedies, such as damages, the purpose of a structural interdict is not deterrence or compensation as such. In broad terms, its purpose is the elimination of systemic violations existing especially in institutional or organisational settings.[60] Rather than compensate for past wrongs, it seeks to adjust future behaviour and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered.[61] Its most prominent feature is that it provides for a complex ongoing regime of performance and is not a one-shot and one-way approach of providing relief.[62] Its ongoing

56 Para 5.
57 *Olivia* case (n 55 above) para 16.
58 See H Moray *et al* 'Victory for engagement in relocation from San Jose' *Business Day* 9 September 2008.
59 As above.
60 See S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 30.
61 See the discussion in ch four sec 4.3 regarding the relationship between rights and remedies.
62 A Chayes 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* 1281 1298.

nature is facilitated by the court's retention of jurisdiction, and sometimes by the court's active participation in the implementation of the decree.

The structural interdict is a response to the inadequacy of the traditional remedies in responding to systemic violations of a complex organisational nature.[63] The traditional remedies may not be effective to eliminate systemic violations because these may require negotiation, dialogue, *ex parte* communications and broad participation of parties not liable for the violation.[64] The structural interdict has also been inspired by a recognition that some constitutional values cannot be fully secured without effecting changes in the structures of complex organisations, especially in government bureaucracy settings.[65]

In a setting of systemic violations, what would be most appropriate are those remedies that aim at achieving structural reforms and tackling the systemic problems at their root rather than redressing their impact. This may require the development of on-going measures designed to eliminate the identified mischief,[66] and to promote participation of not only the parties, but also third parties in the remedy selection process. Dealing with systemic violations in institutional settings also requires a continued establishment of facts and the continual interplay between such facts and the legal consequences thereof.[67] This is important because in such cases, the problems could have their roots in the structural characteristics of the institution itself.[68] Facts that enhance the court's understanding of the nature of the institution therefore become relevant at all stages of the case.[69] The cases may also require frequent redetermination of liability and reformulation of relief.[70]

63 S Sturm 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* 1355 1357.
64 Sturm (n 63 above) 1357.
65 O Fiss 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 2.
66 Chayes (n 62 above) 1297. See also Special Project 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* 784 812.
67 Chayes (n 62 above) 1297.
68 Note 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard Law Review* 433.
69 It has been submitted that understanding the institution will permit the policy maker, whether administrative or judicial, to anticipate obstacles to implementation and develop strategies of surmounting the obstacles. Note (n 68 above) 435.
70 Special Project (n 66 above) 790. In fact, the Special Project has described the resulting decree as resembling a legislative or executive act (791).

It is because of these factors that the structural interdict has become a preferred remedy in what have been described as structural or institutional suits.[71] These suits challenge large scale government deficiencies, sometimes arising out of organisational or administrative failure. The causes of the failure are various: failure to use (or misuse of) discretion, negligence, failure to comprehend the law, administrative red tape, and deliberate disregard of rights. Usually these suits are preceded by political pressure and instituted only when this is unsuccessful. However, even when they are filed, political pressure may continue to be exerted on the government.[72] The suits are usually multi-partied, with large numbers of plaintiffs, who may act in a representative capacity for known and unknown victims. The suits could also have *amici* and interveners, and may be instituted against a multitude of government departments and institutions.

The facts in institutional or structural litigation are often complex, and much of the judges' efforts are dedicated to finding an amicable solution acceptable to all the parties and which will lead to structural reforms. Usually the remedial decree is perceived as the key to the success or failure of the litigation.[73] The most common practice is for the court to push the parties to agree on a plan and to register that plan as a decree contained in a mandatory interdict. However, even after this is done, the court does not let go - it retains jurisdiction over the case and, if need be, may supervise the implementation of the remedial plan.

Contrary to general perception, although there is no denying that their application in the realm of public law has been more controversial, structural interdicts are not exclusive to public law but have been applied in private law as well. In the realm of private law, courts have, for a very long time, undertaken managerial roles resulting either from judicial initiatives or from statutory powers. Courts have through receivers managed bankrupt or insolvent companies and supervised the administration of trusts, estates and wills.[74] Eisenberg and Yeazell submit that the view that the traditional lawsuit ends almost amicably at a stage well before the administration of the remedy is artificial.[75] They contend that in this 'old' litigation, as in the public litigation that has engendered so much outcry, administering remedies often creates resistance and the

71 See W Fletcher 'The discretionary constitution: Institutional remedies and judicial legitimacy' (1982) *Yale Law Journal* 635 637. See also generally T Eisenberg & S Yeazell 'The ordinary and the extraordinary in institutional litigation' (1980) *Harvard Law Review* 465.
72 Fletcher (n 71 above) 637.
73 Fletcher (n 71 above) 637-638.
74 See Berryman (n 4 above) 110.
75 See also Eisenberg & Yeazell (n 71 above) 474.

courts must expend a great deal of energy and devise ingenious procedures to overcome such resistance.[76]

The structural interdict as a remedy in constitutional litigation is traced back to the US school desegregation cases. The leading case in this respect is *Brown v Board of Education*.[77] This case was propelled by the need to realise transformation of the dual school system, based on race, into a unitary non-racial school system. This required a great deal of organisational reforms to transform the entrenched racial segregation which had survived for hundreds of years. The courts were required to transform this entrenched *status quo* and to reconstruct the social reality in a very radical manner.[78] There was just too much on the sleeves of the judges: What was required included establishing new procedures for student assignments, new criteria for the construction of schools, a revision of transport routes, reassignment of faculty, curricular modifications, reallocation of resources and above all, establishing equity in the school system. The question was whether this would have been achieved through the conventional one-stance traditional litigation and remedial procedures. The answer was a definite no; it required protracted and unusual methods of litigation and remediation.[79]

It is in this context that the Supreme Court made its orders in *Brown* and similar cases. The Supreme Court recognised the fact that the school authorities were better placed to solve the problem of segregation. It noted, however, that there was a need for the courts, especially the local courts, to consider whether the actions of the school authorities constituted good faith implementation of court orders. The Supreme Court advised that in discharging their roles the local courts had to be guided by the principles of equity 'characterised by a practical flexibility in shaping the remedies and facility for adjusting and reconciling public and private needs'.[80] The Court required that the defendants make 'a prompt and reasonable start toward full compliance' with the ruling of the court.[81] During what the court termed as a period of transition, the courts were advised to retain jurisdiction over the cases. This was to enable the courts to monitor the implementation of their decrees and to intervene or issue further orders if necessary. Indeed, this is what happened. Most school authorities did not implement the orders,

76 See also Roach (n 31 above) 13-3.
77 349 US 294 (*Brown* case).
78 Fiss (n 65 above) 2-3.
79 Fiss (n 65 above) 3 has submitted that 'desegregation required a revision of familiar conceptions about party structure, new norms governing judicial behavior, and new ways of looking at the relationship between rights and remedies'.
80 347 US 483 496.
81 347 US 483 497.

which forced the courts to intervene more intrusively and to give specific directions.

6.3.1 The unusual features of the structural interdict

Flexible and gradual

The structural interdict is very flexible: Its form at the beginning of the case may differ from its form when the case is concluded. Although this fluidity may seemingly present some problems of implementation, it is the kind of flexibility that contributes to the strengths of this kind of relief. It allows for the revisiting of the remedy without having to institute fresh litigation; it also allows for accommodation of changed circumstances thereof.[82] The non-specificity of a structural interdict at the stage when it is first made therefore is not by default but by design. The essence of a generally stated structural interdict is to give latitude to the executive, or sometimes the legislative branch of government, to choose the most appropriate remedy for the violation. Specificity should come as a matter of last resort. The order may initially merely require that a wrong be corrected. With time, however, the terms of the order may become more specific by detailing what ought to be done and within what time. This point is reverted to later.[83] Unlike the other types of interdicts which are usually backed by contempt of court sanctions, recalcitrance in the case of a structural interdict is in most cases followed by supplementary orders.[84] Fiss attributes this to the fact that the purpose of a structural interdict is to serve a preventive role to deter future wrongs and is not a coercive act issuing a command. Instead, it is a declaration that the court will manage or direct the reconstruction of an institution in order to bring it into conformity with the Constitution. He submits that this role requires the court to induce collaboration, and to give authoritative directives as a last resort:[85]

> The usual scenario in the structural context is for the judge to issue a decree (perhaps embodying a plan formulated by the defendant), to be confronted with disobedience, and then not to inflict contempt but to grant a motion for supplemental relief. Then the cycle repeats itself. In each cycle of the supplemental relief process the remedial obligation is

82 Revisiting of the remedy in this way may arise because of factors that were not anticipated when the remedy was designed. This is in addition to changes in the degree of recalcitrance and willingness on the part of the defendant to abide by the orders of court which may motivate the court to loosen some of the tough conditions in the order.

83 See sec 6.6.1 below.

84 This is not to suggest that there can be no stages at which contempt of court order sanctions become appropriate.

85 Fiss (n 6 above) 37.

> defined with greater and greater specificity. Ultimately, after many cycles of supplemental decrees, the ordinary contempt sanctions may become realistically available, but the point to emphasise is that it is *only* then — only at the end of a series — that the threat of contempt becomes credible.[86]

The factors propelling such specificity are discussed later in this chapter,[87] but it is mainly the inadequacy of the steps taken by the defendant, or even the degree of recalcitrance exhibited. According to Fiss, the gradualism of the structural sanctioning system might be attributable to political considerations (such as a desire to 'go slow' so as to build wide popular support for the remedial enterprise). He argues that, although it might be said that it reflects ambivalence toward the underlying decree, the gradualism has deeper roots: uncertainties in the goal to be achieved (for example, what is a 'unitary non-racial' school system) or shortcomings in our knowledge and ability to restructure ongoing institutions.[88] The gradualism also helps the court juggle around a number of options in its search for the most effective way of remedying the violation. It is not until the court has decided on what it considers the most appropriate means of remedying the violation that it concretises the order.[89] I discuss this point in detail below.[90]

Retention of jurisdiction

The most peculiar feature of the structural interdict is the court's retention of jurisdiction over the case even after judgment has been passed. The courts have disregarded the traditional *functus officio* doctrine, which requires that, once a court has made a final determination of a matter, its jurisdiction over the case ceases and the case is closed.[91] Although the case can be reopened, conventional legal procedures put in place stringent legal requirements that have to be satisfied before this is done.

Retention of jurisdiction by the court helps a party who thinks that the order is not being complied with to bring this to the attention of the court. It also helps the persons to whom the order is directed, in certain circumstances, to seek clarity from the court as regards what the order entails. Courts have also retained jurisdiction to enable them to participate sporadically in the administration of the

86 Fiss (n 6 above) 36 (emphasis in original).
87 See sec 6.6.1 below.
88 Fiss (n 6 above) 36.
89 Cooper-Stephenson (n 7 above) 36. See also Fiss (n 6 above) 36.
90 Sec 6.6.1.
91 For a detailed discussion of the *functus officio* doctrine, see M Pretorius 'The origins of the *functus officio* doctrine, with specific reference to its application in administrative law' (2005) 122 *South African Law Journal* 832. See also Special Project (n 66 above) 816.

institutions whose reform they seek to achieve.[92] In such a case, the retention will be accompanied by a stipulation of supervisory powers, thereby establishing supervisory jurisdiction on the part of the court. Supervisory jurisdiction is particularly necessary where a mandatory order has been issued in terms that are so general that it is not possible to define with precision what is required of the defendant.[93] The continued participation in the case by the court will enable it to make its order more precise as new facts and circumstances present themselves.

General orders may be made, either because of the nature of the duty, such as the duty to act reasonably, or because the court is anxious to leave government with as much latitude as possible on how to comply. This may be based on the conviction that the government will comply with the order and carry it out in good faith. The retention of jurisdiction in this case helps the court to keep a watchful eye over the defendant, which is motivated by the fact that at this stage compliance is dependant on the defendant's good faith. An example of this can be seen in the Canadian *Société des Acadiens* case. In this case, the Court made a general declaration and initially declined to assume a supervisory role because it was convinced that the defendant would comply in good faith. However, because of the general nature of the order, the Court decided to retain jurisdiction. As it turned out, the defendants were in fact the first to make use of this jurisdiction when they sought clarity on the nature of their obligations. A few months down the road, the order was transformed into a mandatory order because of evidence of non-compliance on the part of the defendants. If jurisdiction had not been retained, the plaintiffs would have had to commence a fresh and possibly unwinding proceedings to secure compliance with the court order.

Retention of jurisdiction also affords the successful litigant with an opportunity to be heard after the defendant has formulated his response to the court's directions. In the case of the government defendants, the successful litigant is given a second chance to be heard by a government whose initial failure could have been the cause of the litigation.[94] The government would be compelled, this time round, to engage with the plaintiffs in meaningful dialogue because of the knowledge that the doors of the court are open to the plaintiffs. This is in addition to the reluctance to endure another wave of embarrassment arising from litigation which is easy to trigger. This

92 Note (n 68 above) 428.
93 K Roach & G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *South African Law Journal* 325 334.
94 D Davis 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* 3 6.

is very crucial for poor litigants who may not have the resources to institute another suit in case of non-compliance by the defendant.[95]

Additionally, retention of jurisdiction enables the courts to work out a negotiated compromise between the parties in order to secure full implementation of the order. The period of retention may be used to give the parties a cooling-off time, which could allow for a compromise to be reached. This is one of the reasons why a court may be prepared to delay full implementation of its orders and to rely on negotiations between the affected parties in order to win their support and acceptance of the remedy.[96] The court may also use the delay to assess the circumstances on the ground and to determine whether there are obstacles that may hamper the effective implementation of the decree. Once any obstacles are identified, the court will be in a better position to devise what it considers to be the best means to confront them. This form of delay also allows the courts to assess the practicalities of the order and the perspectives of the affected parties.[97] This is important because it avoids imposing undue remedial burdens not only on the parties but sometimes also on third parties. This is more effectively achieved if the parties themselves are allowed to devise the remedy and to present it for the court's approval.[98] This is in addition to allowing for the participation of affected third parties. I discuss this point in detail in the next section.

6.3.2 Models of structural interdicts

Courts have adopted different models of the structural interdict, not only in different cases but at different levels of the same case. The most commonly used models include the bargaining model, the legislative or administrative hearing model, the expert remedial formulation model, the report-back-to-court model and the consensual remedial formulation model.[99] Each of these models is discussed in the sub-sections that follow.

Bargaining model

The bargaining model involves making remedial decisions through negotiation by the parties involved in the case, plaintiff(s) and defendant(s) or applicant(s) and respondent(s). The biggest advantage of this model is that it produces a remedy that is

95 M Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215 228.
96 Roach (n 31 above) 3-3.
97 K Roach 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* 859 893.
98 Roach (n 31 above) 13-50.
99 See Sturm (n 63 above) 1368-1375.

acceptable to all the parties, thereby easing implementation.[100] The negotiation process could also bring to the fore facts and issues which may have been ignored by the court yet are relevant to having an effective remedy. Such facts and issues will emerge from the perspectives of all the parties. This is very important as it allows parties to bring to light factors they think would affect the implementation of the remedy. [101]

The negotiation process also accords legitimacy to the remedy since the remedy becomes 'self-imposed', as opposed to one that is 'court-imposed' and may be viewed by some of the parties as illegitimate. This is in addition to reducing the burden on the court to resolve some issues, as the parties may come to an agreement on them. The parties then may only litigate on those issues where a deadlock has been reached. Nonetheless, when disagreement arises, the threat of a court-imposed remedy may still force the parties to break the deadlock by coming to an agreement.[102] Regarding the doctrine of separation of powers, the 'self-imposed' remedy will shield the court from accusations of interfering in the affairs of other organs of state. In case of a failure to abide by the remedy, the court will be able to enforce it without fears arising from any separation of powers concerns. This is because the court's involvement will be viewed as justified and therefore legitimate.

The process also saves time; it brings to a quick end the protracted court processes which are sometimes only completed after countless adjournments. The parties will be able to commit their time to the process, if the case means a lot to them. Even if it means a lot to only one party, he or she will mount pressure that agreement be reached. The other party will be forced to submit to the negotiations because of the fear that failure to reach agreement may provoke a court-selected remedy which may not be as favourable as a negotiated remedy.[103] The bargaining model is also appropriate in cases involving governmental action because such action is always, in large part, the product of bargaining and manoeuvring among public

100 Special Project (n 66 above) 810.

101 The best example of the bargaining model is the US case of *Liddle v Board of Education of the City of St Louis* 491 F Supp 351 (EDMo1980). In this case, after failure to extract from the defendants a voluntary school desegregation plan, a district court appointed a third party to oversee the remedial process. The third party, designated as a court master, met with the attorneys of all the parties, both individually and in groups, and shuttled back and forth between them with proposals and counter-proposals. Later the master arranged for direct negotiations between the attorneys. The negotiations were also supervised by an *amicus curiae* until agreement was reached.

102 Special Project (n 66 above) 811.

103 Chayes (n 62 above) 1299.

officials and departments or spheres of government, each with different motives and goals to achieve.[104]

The model has, however, been criticised as encouraging perpetuation of the case and indefinite involvement of the court. This is in addition to sacrificing reasoned decision making on the part of the court. According to Fiss:[105]

> The drive for settlement knows no bounds and can result in a consent decree even in … [structural litigation], that is, even when a court finds itself embroiled in a continuing struggle between the parties or must reform a bureaucratic organisation. The parties may be ignorant of the difficulties ahead or optimistic about the future, or they may simply believe that they can get more favorable terms through a bargained-for agreement. Soon, however, the inevitable happens: One party returns to court and asks the judge to modify the decree, either to make it more effective or less stringent. But the judge is at a loss: He has no basis for assessing the request. He cannot, to use Cardozo's somewhat melodramatic formula, easily decide whether the 'dangers, once substantial, have become attenuated to a shadow', because, by definition, he never knew the dangers.[106]

It should be noted, however, that Fiss's criticism is based on erroneous assumptions. Some of these assumptions are motivated by the purpose of his article, namely, to criticise models of litigation that encourage alternative dispute resolution in the place of court determinations. Structural litigation does not, however, fall in this class of litigation. Structural litigation is conducted with clear appreciation of the fact that the litigation implicates interests beyond the interests of parties. This is a fact that Fiss ignores: He trivialises litigation by reducing its social function 'to one of resolving private disputes'.[107] Fiss also ignores the fact that structural litigation is always opened up to persons not originally parties to the litigation and allows them to bring to the fore their interests. The judge remains conscious of these interests and reserves the right to reject settlements that sideline them. Fiss also does not understand that the continued involvement of the judge in the litigation is motivated by the desire to stop a systemic violation rather than the protection of the interests of the parties.

Furthermore, Fiss assumes that the adversarial litigation process is the only possible method of preserving a reasoned decision-making process.[108] Reasoned decision making could still be preserved even when the order is a negotiated one; the judge could begin by laying

104 Note (n 68 above) 434.
105 O Fiss 'Against settlement' (1984) 93 *Yale Law Journal* 1073.
106 Fiss (n 105 above) 1083 (footnotes excluded).
107 Fiss (n 105 above) 1085.
108 Sturm (n 63 above) 1400-1401.

down the normative standards implicated by the case. Later, at the remedial stage, the judge could then test the remedies agreed upon against these normative standards. Sturm has submitted, and rightly so, that reasoned decision making need not proceed through traditional adjudication based solely on legal norms. He submits that other decision-making methodologies, such as structured negotiation, may be better suited to generating reasoned public remedial decision making when legal norms alone provide an insufficient basis for choosing among possible remedies. In Sturm's opinion, the court's discretion can be effectively structured through the development of norms of public remedial processes that can be articulated by the trial judge and reviewed by appellate courts. Moreover, the court's interpretive role may be preserved by a model of remedial decision making premised on the view of the court as the enforcer of a deliberative process.[109]

The above, however, does not mean that the model is without deficiencies. It may, for instance, compromise the norm of participation.[110] This is because there is never any guarantee that the full range of people and organisations with a stake in the case will be included in the negotiations.[111] As is submitted later,[112] it is important that the norm of participation be promoted by ensuring that all affected parties participate in the remedy selection process. Also, remedies obtained from the negotiations by the parties should be subjected to scrutiny by the court to ensure that they do not negatively impact on third party interests. The court's function when presented with a negotiated remedy is to consider its terms carefully, without assuming that the involvement of all the parties ensured a fair and adequate result. A court should only adopt a proposed consent order if it is reasonable. This is because the parties may not have adequately represented all interests affected by the remedy. The court must, therefore, avoid an order which unnecessarily injures the interests of non-participants.[113] In fact, the court is not entirely relieved from the responsibility of fashioning the remedy.[114] If the parties fail to agree, or if the agreement reached fails to conform to the requirements of the substantive law in issue or accommodate

109 Sturm (n 63 above) 1401-1402.
110 Discussed in sec 6.6.2 below.
111 Sturm (n 63 above) 1414.
112 Sec 6.5.2 below.
113 See Special Project (n 66 above) 812.
114 Chayes (n 62 above) 1299-1300.

third party interests, the judge may intervene and fashion the remedy.[115]

Legislative/administrative hearing model

The legislative/administrative hearing model resembles a legislative committee process providing for public hearings and direct informal participation by interested parties.[116] This model allows persons not originally party to the litigation, but who may be interested in the case, to participate in the formulation of the remedy. It is an effective model in responding to polycentric interests that may be implicated by the case.

Like the bargaining model, this model allows the court to appreciate facts and issues as brought to the fore by those attending at the hearing. These are facts and issues that may probably have not come out in court but relevant to finding an appropriate remedy. Yet, unlike the bargaining model, which may be restricted to identified parties, the legislative hearing model is more easily opened for third parties to express their views

An example of a case where this model was used is the US case of *Pennsylvania Association for Retarded Children v Pennsylvania*.[117] In this case, in addition to conducting extensive informal public hearings, the judge established an advisory committee composed of representatives of the various groups and organisations with a stake in the case. The mandate of the committee was to advise on an appropriate remedy,[118] which was deemed necessary because of the multitude of people interested in the outcome of the case. Their participation made it possible for the different views and divergences to be brought to the fore. However, as discussed below,[119] participation should not be inflated to such an extent that the process becomes muddled, making it hard for the Committee to make a decision.

[115] Sturm (n 63 above) 1415 submits that the bargaining model fails to provide for mechanisms for fostering the accountability of the participants in the negotiation process to those they represent. He contends that, where lawyers are involved, the bargaining closely follows an adversarial model of presentation. Sturm also submits that usually the bargaining model tends to lay emphasis on reaching agreement and proceeds according to an adversary structure which narrows the terms of the discussion and inhibits meaningful exchange (1416). The lawyers control the agenda and the process of negotiation. It is, therefore, important for the court to ensure the participation of those affected and accountability to them through, eg, the legislative and hearing model.

[116] Sturm (n 63 above) 1370.

[117] 334 F Supp 1257 (ED Pa 1971) (*PARC* case).

[118] See Sturm (n 63 above) 1370.

[119] Sec 6.6.2.

Nonetheless, the openness of the process allows for a better understanding of the polycentric interests implicated by the case. The informal nature of the process also makes accessibility much easier especially for the weak and vulnerable. Such persons may not have the resources to initiate and sustain litigation. This is in addition to the fact that the process gives rise to a variety of remedies to choose from.

Expert remedial formulation model

The expert remedial formulation model involves the appointment of either an individual expert or a panel of experts with a mandate to develop a remedial plan. Sometimes these experts are designated as court officials and have judicial powers.[120] The court-appointed experts in structural litigation differ from those in other forms of litigation. Experts in other forms of litigation are always restricted to fact-finding mandates. In contrast, the experts in structural litigation are usually mandated to design and propose a remedial plan.[121] The expert could even be designated as an administrator with a mandate to take over and manage the institution for the purposes of effecting reforms. The expert model is particularly relevant in those cases where specialised and technical skills are required to formulate an appropriate remedy. This could be in those cases where there is, for instance, a need to appreciate some social information facts before formulating the order.[122] The court may not have the expertise and skill to ascertain the social facts. This does not, however, mean that the parties are left out of the remedy-finding process. In spite of their skills, the experts may be obliged to consult with the parties in formulating the remedial plans.[123] This, like the legislative hearing model, is intended to ensure that polycentric interests are considered and that the remedy is acceptable not only to the parties but to other members of the community who may play a role in its implementation.[124]

However, this model also has its disadvantages. First, it may detract from the need for participation of all stakeholders in the case.

[120] A variety of terms have been used to refer to these experts and panels of experts. These include: receiver, monitor, human rights committee, administrator, advisory committee, ombudsman, committee, audit and review committee, to mention but a few. See Special Project (n 66 above) 826.

[121] See Special Project (n 66 above) 805.

[122] See Special Project (n 66 above) 795.

[123] An example of this is found in *Hart v Community School Board* 383 F Supp 699 (EDNY 1974). In this case, the order of reference required the expert to solicit views not only from the parties but also from community groups within the district.

[124] Sturm (n 63 above) 1419-1420 contends that the expert model also encourages reasoned decision making and fosters the impartiality and independence of the court.

The expert, and not the stakeholders, gets the benefit of integrating the range of information and perspectives on the remedy. The parties' limited involvement may make it difficult for the expert to justify particular remedial decisions. This is because, in the course of developing specific approaches to realising the underlying legal principles, the expert must in some situations pursue goals and norms that are not dictated by those underlying principles. These choices can be justified only by the expert's view of the wisdom of those norms; and those who must live with the remedy may have a different perspective on the norms and how they should be implemented. In some cases, there may be a reasoned basis for striking a particular balance among competing norms and applications in a particular context.

Achieving and justifying this balance, however, requires a participatory process of exploring the interests of, and the factual bases and reasoned justifications offered by, the various participants.[125] In my opinion, however, whether participation is fostered also depends on the expert's mandate and how he or she carries it out. The court may foster participation by making consultation part of the expert's mandate. The court may also leave its doors open to the stakeholders to express their dissatisfaction with the way the expert is conducting him or herself.[126] The parties may also be afforded the opportunity to contradict the proposals of the expert or to present alternative plans. Additionally, the court may not be bound by the recommendations of the expert and may disregard them if found to be erroneous.

Report back to court model

This is the most commonly-used model implemented by requiring the defendant to report back to the court with a plan on how he or she intends to remedy the violation. Usually a fixed date is set for the filing of the plan and the other party is given an opportunity to comment on the plan. It is only when the court is satisfied with the plan that it will concretise it as part of its decree. This model has a number of advantages. First, it allows the court to defer to the government (defendant) on the most effective way of eliminating the violation. This promotes the doctrine of separation of powers and shields the court from accusations that it has usurped functions reserved for the other organs of state. The model also enables the court to harness the expertise that may be in the hands of the defendant. This is especially relevant in the case of government

[125] See Special Project (n 66 above) 807.
[126] This though should not be done in such a way that it undermines the expert's authority and leads to entertainment of frivolous complaints.

because of the quality of expertise that may be at its disposal through its bureaucracy and public service. Secondly, it allows for a self-imposed remedy from the defendant which makes implementation of the remedy much simpler. It is highly unlikely that the defendant will propose a plan that it cannot carry out. In the case of government, such plan will be calculated very well to cater for government's budgetary and related needs. However, the process may not be left entirely to the defendant as both the court and the opposite party are afforded an opportunity to scrutinise the plan. In fact, the court should reserve the right to reject the plan if considered inadequate.

Another advantage of this model is that it allows the parties a cooling-off period and therefore allows for the resolution of the disputes in a dispassionate manner. The parties may be compelled to work together in devising a plan and may be engaged in negotiations in this regard. This will lead to the same advantages as those of the bargaining model discussed above. Indeed, because of its advantages, this model has legislatively been adopted as one of the remedies that can be made under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. In section 21(2)(2), one of the orders which a court may make is to give a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order.

One disadvantage with this model is that it may lead to protracted litigation, especially where the defendant is not willing to participate in the process in good faith. Nonetheless, the protracted litigation may in some cases be necessary to enable the court and the parties find the most appropriate way of stopping the violation. It may also be the only process through which long-term and enduring solutions are found.

Consensual remedial formulation model

The consensual remedial formulation model also tries to secure the consensus of the parties and third parties in the formulation of the remedy.[127] This model allows parties to exchange views and raise contests in a less formal manner. It also fosters a good working relationship between the parties and participation may be open to a variety of stakeholders. However, there is also a danger that has to be guarded against: The process should not be open to selected

[127] An independent third party could be appointed to assist the parties to reach consensual agreement on the remedy. An example of this is *United States v Michigan* 471 F Supp 192 (WD Mich 1979), where a third party was appointed to assist the parties to come to an agreement on the allocation of fishing waters between tribes.

participants. This is important because of the negative impact that negotiated remedies sometimes bear. The most overt negative impact is the exclusion of persons who, though not parties to the suit, may be affected by its outcome.[128] At the same time, the process should not be opened unnecessarily to such an extent that reaching agreement becomes impossible because of the wide range of interests. Preferably, the process should be directed by a third party who is able to co-ordinate and ensure the participation of all stakeholders.

The consensual remedial formulation model is in many respects similar to the bargaining model. The difference is that the consensual formulation model is less formalised and is readily opened to third party participants. The consensual public dispute resolution usually requires the assistance of a third party who acts as the keeper of the process and assumes responsibility for convening the deliberations, assisting groups in choosing spokespeople, helping to establish ground rules and an agenda and identifying and obtaining expert assistance. This is in addition to facilitating fact finding, co-ordinating subcommittees, facilitating the process of collaboration, assuring meaningful participation, preparing detailed minutes of the sessions and helping to build consensus.[129]

The value of this model is deduced from the advantages of amicable settlements and the ease with which remedies obtained by negotiation may be implemented. Indeed, recent evidence, as seen from the *Olivia* case discussed above,[130] indicates that the Constitutional Court has appreciated the importance of consensual remedies. This approach has been replicated and applied in subsequent litigation. An example of this is to be found in the case of *Odinga Mamba and Others v Minister of Social Development and Others*,[131] a case brought by victims of the recent xenophobic attacks to resist the closure of the camps where they had been placed for their safety. In the course of hearing the case, before a decision could be made on whether leave should or should not be granted, the Constitutional Court ordered the parties to engage each other with a view of getting to an amicable settlement. This direction appears to have been based on the belief that an amicable settlement would

[128] See generally M Schwarzschild 'Public law by private bargain: Title VII consent decrees and the fairness of negotiated institutional reform' (1984) *Duke Law Journal* 887. While Schwarzschild appreciates the advantages of negotiated decrees in structural reform litigation, he warns against their potential negative impact. On a positive note, however, he submits that they save the court's time and secure the co-operation of the parties in the remedial exercise. On the negative side, they may exclude third party interests and may also disempower the court. The court will be denied the opportunity of deciding the case after a full hearing.

[129] Sturm (n 63 above) 1423.

[130] See sec 6.2.1 above.

[131] CCT 65/08.

result in a relief acceptable by all the parties. This explains why the Court ordered that the engagement extends to other stakeholders in the matter, including the United Nations High Commissioner for Refugees.

6.4 Arguments for and against the structural interdict

Objection to the structural interdict has been based on two broad arguments: separation of powers and institutional competence-type arguments and arguments based on the notion of corrective justice. Although chapter two extensively discusses the separation of powers and institutional dimension objections to socio-economic rights, it is worth discussing them here again in the context of the structural interdict. This is because the dimension of the objections as regards the structural interdict is very specific and a discussion of the structural interdict without the separation of powers based objection would be incomplete.

6.4.1 Separation of powers-type arguments

As discussed in chapters two and three,[132] making budgetary allocations and making policy-related choices are considered an exclusive domain of the legislative and executive branches of the state and not the courts. This is because the process of making budgetary allocations and policy choices gives rise to very difficult questions relating to the making of expenditure, policy and prioritisation. These questions are considered to be appropriately answered not in judicial but policy-making processes. It is on this basis that structural litigation has been perceived as inappropriately moving the courts 'from the byways onto the highways of policy-making'.[133] It has been submitted that what this means is that there is now more overlap between the courts and the legislature in formulating policy and between the courts and the executive in both formulating and carrying out programmes. Accordingly, the types of decisions being made by the various institutions in terms of their scope and level of generality seem to be converging somewhat.[134]

Although all forms of constitutional litigation may carry budgetary consequences, budget-related questions in socio-economic rights litigation requiring the structural interdict are always more

[132] Sec 2.2.1 of ch three & sec 3.2.4 of ch four.
[133] D Horowitz *The courts and social policy* (1977) 9. Referencing A Bickel *The least dangerous branch: The Supreme Court at the bar of politics* (1962), Horowitz submits that this has led to judges viewing themselves as roving commissions and as problem solvers charged with the duty to act when majoritarian institutions fail.
[134] Horowitz (n 133 above) 20.

pronounced.[135] Litigation of this nature usually takes the form of restructuring large organisations to provide services that have in the past been neglected and which impact on a number of people. This may call for a great deal of money and other resources to be provided by the government. This is in addition to involving the courts in what may appear to be administrative and policy-making matters. According to Frug, the orders in the institutional cases do not deal directly with either the raising or the allocation of money. They simply require a specified level of services, leaving to the legislature the necessary revenue raising and allocation decisions that result from the order. Frugs contends that, although the court does not specify the source of the money needed to comply with its order, it still is engaging in budget allocation.[136]

However, as discussed in chapter two,[137] courts possess qualities that make them well-suited to perform some tasks where there is evidence of either failure or neglect on the part of the other organs of state. These characteristics include insulation from narrow political pressures, the ability to gather information within their non-bureaucratic structures and the willingness to encourage participation of affected interests.[138] It is, therefore, important that the competence of the courts in eliminating systemic violations be analysed not only in terms of institutional inappropriateness but also in terms of their advantages.[139] The courts should, therefore, be mandated to use their special qualities and intervene by way of a structural interdict where other organs have failed or neglected their duties.[140] This point is canvassed later in discussing the norms and principles of the structural interdict.[141]

135 Horowitz (n 133 above) 7.

136 G Frug 'The judicial power of the purse' (1978) *University of Pennsylvania Law Review* 715 739. Nagel gives examples of United States cases in which government expenditure has been increased dramatically as a result of structural interdicts. In one mental institution case, the operating and capital expenses increased by US $29 million in one year. R Nagel 'Controlling the structural interdict' (1984) 7 *Harvard Journal of Law and Public Policy* 395 397. In this regard, Horowitz (n 133 above) 6 gives the example of a case which led to an increment of the state's annual expenditure on mental institutions from US $14 million when the suit was filed to US $58 after the decree was made.

137 Sec 2.3.

138 Sturm (n 63 above) 1408.

139 Note (n 68 above) 437. This is not to suggest that the institutional competence and separation of powers concerns are totally irrelevant. The courts have to be cautious and to refrain from overrunning the executive and legislative branches of the state unless this is absolutely necessary. It is submitted later in this chapter (sec 6.6.1 below) that judicial supervision should only be justified when the political bodies that should exercise the necessary discretion are seriously and chronically in default.

140 A Rycroft 'Judicial innovation and the delinquent state: A note on the *State and Mfezeko Zuba and 23 similar cases*' (2004) 20 *South African Journal on Human Rights* 321 325. See also Davis (n 94 above).

141 Sec 6.5 below.

Nonetheless, it should be acknowledged that the structural interdict may raise issues touching on the institutional capacity of the courts as the judges may carry out what may appear to be administrative functions for which they are ill-suited.[142] This is one of the factors that force courts to prefer procedures that provide final determinations to disputes. This is in contrast to those procedures that call for a multiplicity of actions and ongoing judicial supervision.[143] The courts do not want to be entangled in the day-to-day running of government.[144] Fiss has submitted that such entanglement may compromise the judge's independence and may act as an entry point for the judge into the world of politics.[145]

In my opinion, however, the relevant issue is whether or not such entry is justified by the circumstances of a particular case and whether respect for other organs of state could still be maintained. Respect for the executive and legislative branches of the state could still be realised by crafting the structural interdict with a degree of deference to the other organs. This is especially at the initial stages of the remedial process.[146] The court may have to begin by acknowledging the competence and expertise at the disposal of the state. The court should seek to harness this expertise by requiring the government to come up with a plan detailing how it intends to remedy the proclaimed violation. This approach, if successful, will heighten the chances of the remedy being implemented as it may do away with resistance from the other organs. This is because of the involvement of those responsible for its implementation in its formulation. Though the court may choose to be intrusive, it could still, in the formulation of the remedy, involve the state institution which is at fault. The court could, for instance, appoint an expert who is mandated to assist the parties to themselves find a solution to the problem. A more intrusive approach would require the expert to find a solution, with or without the contribution of the parties. An even more intrusive approach would force the court itself to come up with a solution and to ask the government, for instance, to implement its order within a

142 C Sunstein 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* 749 753. See also Special Project (n 66 above) 813.

143 Cassels (n 5 above) 289. Horowitz (n 133 above) 19 attributes the institutional challenges faced by the courts to the shift from the traditional nature of judicial review which merely required forbidding of state action by the judiciary saying no to other branches. The approach has been changed to one of requiring affirmative action on the part of other branches, which may constrain the resources of the judiciary to manage the task of commanding.

144 I Currie & J de Waal *The Bill of Rights handbook* (2005) 218-219. Currie and De Waal have suggested that it is, therefore, important that the terms of the order be devised in a flexible manner that does not result in supervision becoming too intrusive and result in a blurring of the distinction between executive and judicial functions (219).

145 Fiss (n 65 above) 46.

146 Cooper-Stephenson (n 7 above) 34.

stated time and to report on the same. However, as is noted below,[147] the court should gravitate towards such intrusiveness only when it is absolutely necessary to do so.[148] The circumstances that determine the level of intervention are detailed under the discussion of norms and principles below.[149]

In conclusion, therefore, the separation of powers objection is not totally unfounded. Courts should not use the structural interdict to assume functions of other organs of state as of first resort. I submit in this chapter that using the structural interdict should be a matter of last resort and only where there is evidence of failure on the part of government to exercise its discretion.[150] It is this degree of failure and extent of government recalcitrance that should dictate the level of judicial intrusion.

6.4.2 Corrective justice-type arguments

As seen in chapter four,[151] the theory of corrective justice requires that victims of violations be put in the position they were in before the violation occurred. It is on the basis of this principle that the structural interdict has been condemned for its failure to put victims in the position they would have been but for the violations. Nagel, for instance, refers to the US school desegregation cases and submits that these cases did not benefit the students who had been illegally segregated and who instituted the actions.[152] The orders were instead directed at making structural reforms that would only bring about change in the long run.

The structural interdict also contravenes the notion of corrective justice by adopting unconventional mechanisms of adjudication. As seen above,[153] for instance, the structural interdict may force judges to ignore the principle of *functus officio* by allowing courts to retain jurisdiction. It is, for example, on the basis of the *functus officio* principle that an appellate court in Canada set aside a decision by a lower court to retain supervisory jurisdiction in *Doucet-Boudreau v*

147 Sec 6.6.
148 Horowitz (n 133 above) 24 concedes that where there is reticence on the part of other branches as regards policy decision making, however imperfect a judicial remedy is, it may be the best available due to the absence of performance by other branches. Horowitz could be read as suggesting that in a situation of a recalcitrant government, the courts have to use all kinds of creative means to protect the values and rights guaranteed by the Constitution. The structural interdict is an example of such creative remedies used to achieve compliance with court orders.
149 Sec 6.6.1.
150 See sec 6.6.1.
151 Sec 4.2.1.
152 Nagel (n 136 above) 402.
153 Sec 6.3.1.

Nova Scotia.[154] The Nova Scotia Court of Appeal found the retention of supervisory jurisdiction to be out of order; it held that the principles of *functus offico* ought to be preserved even in Charter rights litigation. But as will be seen later, the Supreme Court of Canada set aside this holding and approved the approach of the trial judge.

Additionally, the structural interdict goes against corrective justice by allowing judges to abandon their role as independent umpires who act only on evidence and proof presented to them in an adversarial manner. In structural litigation challenging systemic violations and requiring a structural interdict, judges are sometimes forced to intervene proactively by, for instance, seeking evidence themselves without waiting for presentations from the parties. The judges may also be actively involved in the implementation of their orders and may assume administrative roles.

It is important to note, however, that corrective justice is inappropriate to cases challenging systemic violations in an institutional or organisational setting.[155] This is because of the multitude of interests that these cases implicate beyond the interests of the individual plaintiffs and defendants. If these interests are to be considered, in most cases, full correction of the wrong becomes impossible and the plaintiff's interests may have to be sacrificed partially because of the need to protect other equally legitimate interests.[156] Because of the structural nature of such a suit, the court is required to adopt orders that not only reflect the interests of the parties but also public policy and to treat fairly interests not adequately represented.

Traditional procedures of litigation may not be able to provide social information or legislative facts which may be necessary in designing an appropriate remedy. The use of such information is necessary because of the frequent legislative nature of the order.

154 [2003] 3 SCR 3 (*Doucet-Boudreau* case). For a detailed discussion of this case, see D McAllister '*Doucet-Boudreau* and the development of effective section 24(1) remedies: Confrontation or co-operation?' (2004) *National Journal of Constitutional Law* 153. The main issue in this case was whether a trial judge had powers, after making a mandatory order, to retain jurisdiction in order to hear reports from the defendants regarding the progress in the implementation of his order. The trial judge had adopted this approach and presided over several reporting sessions for a period of about nine months. The judge required affidavits to be filed prior to every reporting session detailing the measures adopted. The respondents were on every such occasion afforded chance to adduce rebuttal evidence ([2003] 3 SCR 3 para 8).

155 See generally Chayes (n 62 above).

156 See Roach (n 97 above) 877. The remedies also ignore the causal link that is alleged to exist between rights and remedies. This is because full remediation of all the interests cannot be achieved if the remedies are pegged to the establishment of liability. See Roach (n 97 above) 874.

Without such information, the court may not understand the nature of the remedial problem. The court cannot rely on the parties, as is the case in the adversarial procedure, to produce all the legislative facts required.[157] In this setting, therefore, corrective justice principles 'offer unstable foundation for structural remedies because of their limitation as principles best suited for rectification of discrete wrongs committed by one individual against another'.[158] Roach submits that corrective justice's presumption of causation encourages an absolutist approach to remedial decision making by ignoring the socio-economic background of the violation, the involvement of other parties and interests, and the possibility that intervening forces will work against the court's remedy. In his opinion, causation discourages open balancing of interests or addressing intervening factors that can threaten a remedial ambition.[159] Fiss follows the same line of thought and identifies a number of distinctions between the structural suit and the traditional suit.[160] These distinctions, although this is not mentioned by Fiss, are structured along the lines of the notions of corrective and distributive justice. Fiss describes the traditional suit as challenging a legal wrong as opposed to a structural suit which opposes a social condition that threatens the constitutional values. While the victim of a traditional suit is deemed to speak for him or herself, the victim of a structural suit is not an individual but a group of people. The suit could have been triggered by an individual but it remains representative of a group interest. The same may be said to apply to the defendant who may be perceived as the wrongdoer. Fiss submits that in structural suits the defendant may not even be a wrongdoer, and yet has other interested parties behind him who may not be defendants.

In structural settings, the finding of an appropriate remedy may require the courts to depart from the traditional process of litigation built around individualised litigation which seeks to enforce corrective justice. The evidence on the court record at what would ordinarily be the conclusion of traditional litigation may, for instance, be inadequate for choosing an appropriate remedy. It may be necessary for the court to retain its jurisdiction in order to adjust its remedies in response to the factual discoveries that may emerge later. The court may also have to involve parties who were not part of the original litigation in its factual inquiries.[161] The traditional adversarial presentation of proof and evidence may also prove inadequate because of the need for information on facts that do not necessarily inform the disputes between the parties.

157 Special Project (n 66 above) 792-793.
158 Roach (n 97 above) 874-875.
159 Roach (n 97 above) 875.
160 Fiss (n 65 above) 18-32.
161 Sturm (n 63 above) 1367.

Additionally, such common law principles as *functus officio,* if considered, may impair the capacity of the courts to administer justice in a more flexible manner. The courts will be barred from retaining jurisdiction to ensure that the remedial orders are implemented to their final end. In the Canadian *Doucet-Boudreau* case, for instance, the majority in the Supreme Court held that some of the common law principles such as *functus officio,* as found outside Charter jurisprudence, are overly vague and inapplicable to orders made under section 24(1) of the Charter.[162] They held that there was need for creative remedies in enforcing Charter rights to meet the challenges and circumstances presented by the cases under the Charter. The majority held that tradition and history should not present themselves as barriers to this enterprise; the judicial approach must be flexible and responsive to the needs of a given case.[163] The circumstances of the case, according to the majority, disclosed delay on the part of the defendants, yet the protected rights were imperilled.[164] The traditional procedures of litigation would have but furthered these delays. The order of the trial judge was found to have been flexible and sufficient to address unforeseen difficulties.[165]

It therefore remains true that the structural interdict has a very important role to play in uprooting systemic violations, especially in institutional or organisational settings. What remains to be explored is whether (and how) the South African courts have made use of this very important remedy. The next section will show the circumstances under which the South Africa courts have deemed the structural interdict appropriate.

6.5 South Africa: Which way?

The South African experience shows a willingness and frequent use of the structural interdict in High Court socio-economic rights litigation, but reluctance on the part of the Constitutional Court to use this form of relief. In spite of this, the Constitutional Court has acknowledged that it is within its powers to grant structural remedies, including the structural interdict. The Court has indeed easily availed itself of this remedy in civil and political rights litigation. In this section, I contrast the approaches of these two courts and the reasons for this.

162 [2003] 3 SCR 3 para 54.
163 n 162 bove, para 59.
164 n 162 bove, para 60.
165 n 162 bove, para 68.

6.5.1 The approach of the High Court

The High Courts have rejected the view that a declaratory order would be the only sufficient remedy for the government to implement orders from the courts. The Cape of Good Hope High Court, for instance has considered a declaratory order without injunctive relief to lack practical content.[166] Most importantly, however, the Court considers the structural interdict to be of practical importance both to the applicants and the government. This is especially in those cases where there is insufficient information before the court to determine the most appropriate relief that would redress the violation. The practical advantages arise particularly from the court's retention of jurisdiction over the case. The applicants, on the one hand, would not be bothered by filing new papers when more information emerges. On the other hand, it would be fair to the respondent government which may need more time to come up with solutions. In the words of Davis J, in fairness to the respondents, who now know where their duty lies, they should be given an opportunity of proposing a practical solution. Yet in fairness to the applicants, now that they know where their rights lie, the respondents should be directed to make such proposals within a reasonable time. The judge adds that the applicants should furthermore have the opportunity of commenting on the proposal, and the respondents should be allowed to respond to such comment.[167]

At the High Court level, the structural interdict has also been underlined as an appropriate response to systemic violations. The Court has observed that other remedies, 'such as declarator, the prohibitory interdict, mandamus, and awards of damages', are inappropriate to remedy 'systemic failures or the inadequate compliance with constitutional obligations, particularly when one is

[166] See *Grootboom v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C) (*Grootboom Oostenberg* case). In this case, the High Court found that the state was obliged by sec 28(1)(c) of the Constitution to provide shelter for children. The Court ordered the state to provide the children with shelter until such time as their parents were able to shelter them. The government was also ordered to report to the Court, under oath, within a period of three months from the date of the order, on how it was planning to eradicate the violation. The applicants were also given a right to deliver a commentary on the government report within a period of one month after the state report.

[167] *Grootbom Oostenberg* case (n 166 above) 292. One of the issues that the Court thought needed clarification was the question of on which sphere of government the remedial obligations in the case would lie, the Oostenberg Municipality or the Cape Metropolitan Council. The judge hoped that this would be clarified in the plan to be filed (293).

dealing with … rights of a programmatic nature'.[168]

Additionally, the High Court has been motivated to grant structural interdicts by the need to protect and promote the doctrine of separation of powers. The structural interdict has enabled the Court to give latitude to the executive branch of government by deferring to it on the most appropriate solutions to address unconstitutional conditions. In this respect, '[t]he structural interdict is not intended to substitute the judiciary for the administration, but to relieve the judge from framing relief in a way that would constitute democracy by judicial decree'.[169] This, as seen above, is what the Court has described as the opportunity given to the respondent to propose a practical solution. According to Budlender:[170]

> Structural interdicts can be deeply democratising. They create spaces for dialogue between the court, the government and civil society actors. In this way, they strengthen and deepen accountability and participation — the key elements of democracy.

Rather than violate the doctrine of separation of powers, the High Court, therefore, views the structural interdict as a means of preserving the doctrine. The latitude given to the government to fashion the remedy indicates that the High Court is not prepared to assume functions that are preserved for the executive organ of the state. The executive branch is, therefore, required to execute self-imposed rather than judicially-imposed remedies.

It appears, however, that the main reason the Court has resorted to the structural interdict is to counter recalcitrance by the

168 *S v Zuba and 23 similar cases* 2004 4 BCLR 410 (E) (*Zuba* case) para 36. This case arose from the absence of juvenile reform schools in the Eastern Cape. It had been established in evidence that the provincial government had just embarked on what was to be a long planning process of establishing a reform school in the province. After reviewing the problems as regards the establishment and maintenance of reform schools in the province, the Court ordered the Department of Education to file a report disclosing its short, medium and long term plans for the incarceration of juvenile offenders. It was also ordered that a task team, to work on the establishment of a reform school, be identified, and its reports be submitted on a regular basis to the inspecting judge as regards progress until the school is established.

169 Davis (n 94 above) 6.

170 G Budlender 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8 *ESR Review* 9 11.

government towards court orders. In *City of Cape Town v Rudolph and Others*,[171] for instance, the Court justified the structural interdict by the circumstances of the case, in particular the attitude of denial expressed by government. The government had deliberately failed to recognise the plight of the respondents, thereby ignoring the *Grootboom* judgment to the effect that those in desperate need should not be ignored.[172] In this case, on the basis of the *Grootboom* case, the Court had found that Cape Town's housing programme was unreasonable in as much as it failed to make provision for short term needs — the needs of those in desperate or crisis-like situations.

The structural interdict has also been justified by 'the dilatory and lackadaisical approach taken' by the state in some cases.[173] The recent case of *EN and Others v Government of RSA and Others*[174] is evidence of this. The degree of recalcitrance exhibited by the government in this case makes it worthwhile discussing the case in detail. The case was commenced by the AIDS Law Project (ALP), the Treatment Action Campaign (TAC) and 15 HIV/AIDS-positive prisoners from the Westville correctional facility in KwaZulu-Natal. The applicants sought orders to compel the government to remove all obstacles preventing the 15 and other similarly-placed prisoners from accessing anti-retroviral (ARV) treatment. They also sought an order that the government provides the 15 and other similarly situated prisoners with ARV treatment in accordance with the existing government Operational Plan for Comprehensive HIV and AIDS Care,

171 2003 11 BCLR 1236 (C) (*Rudolph* case). Eg, the Court justified the structural interdict by the circumstances of the case, in particular the attitude of denial expressed by government. The government had deliberately failed to recognise the plight of the respondents, thereby ignoring the *Grootboom* judgment to the effect that those in desperate need should not be ignored (1279). In this case, on the basis of the *Grootboom* case, the Court had found that Cape Town's housing programme was unreasonable in as much as it failed to make provision for short term needs - the needs of those in desperate or crisis-like situations.

172 2003 11 BCLR 1236 (C) 1279.

173 *Centre for Child Law and Others v MEC for Education and Others*, Case 19559/06 (unreported) (*Luckhoff* case), High Court Transvaal Provincial Division 11 [lines 7-9] of the unreported judgment. In this case, the respondents contested the conditions under which children placed at JW Luckhoff High School pursuant to sec 15(1)(d) of the Child Care Act of 1983 lived. The physical conditions in the hostels were pathetic: There were poor sleeping facilities; the hostels did not have access control systems; and psychological support and therapeutic services were absent. The applicants contended that these features, among others, amounted to an infringement of the children's socio-economic rights under sec 28. The children had been removed from the care of their parents or families which imposed a direct duty on the state to provide for their socio-economic needs. Murphy J agreed with the applicants that the school needed a quality assurance programme, immediate provision of sleeping bags for the children, and putting in place of a plan for construction of a perimeter wall and access control system.

174 2007 1 BCLR 84 (D) (*Westville* case). For a discussion of this case, see L Muntingh & C Mbazira 'Prisoners' right of access to anti-retroviral treatment' (2006) 7 *ESR Review* 14.

Management and Treatment (Operational Plan).[175] The applicants argued that the Operational Plan had not been implemented with reasonable speed and urgency.

The Court found the implementation of the Operational Plan to be unreasonable and inflexible and had disregarded the needs of prisoners. The respondents were ordered to remove the obstacles that prevented prisoners from accessing ARVs under the Operational Plan.[176] The Court found the respondents to have acted with dilatoriness and a lack of commitment on their part; the judge found 'a singular lack of commitment to appreciate the seriousness and urgency of the situation'.[177] Even when some agreements had been reached between the parties outside court, these agreements had not been honoured by the respondents who instead chose to engage in adversarial litigation. This behaviour motivated the judge to retain jurisdiction and to order that the respondents file a plan within two weeks on how they intended to implement the court order.[178]

Rather than implement the court order in good faith, the respondents instead pursued a technicality-based appeal based on the judge's rejection of a recusal request on the grounds that one of the counsel for the applicants was his daughter. They also failed to file the plan on the due date and instead sought to set aside an interim order made for the implementation of the orders of the Court pending the appeal. This application to stay the order came before Nicholson J,[179] who found that irreparable harm would be suffered by the prisoners if the interim order were set aside. The harm that the prisoners would suffer was not comparable to the inconvenience likely to be suffered by the state.[180] Nicholson castigated the state for creating a constitutional crisis:

> If the government of the Republic of South Africa has given such an instruction [to disobey the Court order] then we face a grave constitutional crisis involving a threat to the doctrine of separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.[181]

This case demonstrates how government recalcitrance can lead to the breakdown of constitutional dialogue and the struggles by the judiciary to restore this dialogue. The case also shows the minimal

[175] Available at http://www.info.gov.za/otherdocs/2003/aidsoperationalplan.pdf (accessed 10 March 2007).
[176] See para 35.
[177] See para 24.
[178] See paras 32- 33.
[179] Also recorded as *EN and Others v Government of RSA and Others* Case 4576/06 (unreported).
[180] Para 42 of Nicholson's ruling.
[181] Para 32 of Nichoson's judgment.

appreciation, if not misunderstanding, on the part of the executive of their constitutional obligations, and the role of the judiciary in reasserting these obligations through means such as the structural interdict. Rather than lead to a breakdown in the relationship between the judiciary and the executive, the structural interdict should be viewed as promoting a dynamic dialogue between these two branches. This is dialogue on the intricacies of implementing court orders and actualising constitutional rights.[182] It is clear from this case that, rather than be deferential, in those cases where there is evidence of recalcitrance from the start, use of a structural interdict as a remedy of first resort may be justified. The South African government has in the past exhibited inconsistence and incoherence towards the HIV/AIDS problem.[183] This leaves the courts with no option but to demand, on those occasions when cases are filed, concrete plans detailing the intended response to the problem. The persistence of the court in the *Westville* case forced the government to give in and file a plan as earlier directed.[184]

Analysis of the High Court approach

Although the High Court has readily availed itself of the structural interdict and used it consistently, it has not devised clear principles that could determine when such remedy is appropriate. While the Court has deemed the remedy appropriate whenever there is recalcitrance on the part of government, this does not detail all the relevant principles needed to determine appropriateness and use of the structural interdict. In addition to clear principles that may be used to determine when the remedy is appropriate, there should also be principles on how the remedy should be applied. The High Court has, for instance, not determined the level of recalcitrance that would justify use of the remedy, let alone the causes of such recalcitrance. It is this lack of clear principles in respect of application of the structural interdict that has motivated me to craft a set of norms and principles applicable to this remedy. These norms and principles are detailed in section 6.6 of this chapter.

One should, however, underline some of the important principles that may be deduced from the High Court's approach. These principles, though not exhaustive, are relevant in designing more comprehensive norms and principles, as I do later. First, the High Court has made it clear that the court should retain jurisdiction where the evidence before it is inadequate for the purpose of determining

[182] See M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 414.
[183] See 'Aids criticism: Manto hits back' *Mail & Guardian* 11 September 2006.
[184] See G Stolley 'Prisons department reveals plan for AIDS drugs' *Mail & Guardian* 11 September 2006.

the most appropriate relief. In such a case, the parties should be saved the trouble of having to institute fresh litigation when new evidence or facts come to the fore. Secondly, the structural interdict should be used as a means of paying due deference to the other branches of the state. This is especially so where the court is not clear on the most appropriate way of remedying the violation. The executive and legislative branches should be given the latitude to devise what they consider the best means of remedying the violation. The means should, however, be subject to scrutiny by the court and the opposite party. Lastly, the structural interdict should be resorted to in the face of government recalcitrance. Where there is evidence that the government will not comply, in good faith, with the orders of the court the structural interdict is appropriate.

6.5.2 The approach of the Constitutional Court

The Constitutional Court has emphatically asserted its powers to grant all forms of relief, including a structural interdict, and to exercise supervisory jurisdiction if need be. According to the Court, '[t]he power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented'.[185] The Court also views the structural interdict as a practical remedy which would eradicate conduct giving rise to violation of constitutional rights.[186] Like the High Court, the Constitutional Court has deemed the structural interdict appropriate in those cases where the information before the Court is inadequate for the purposes of making a final order. This is in addition to the lack of expertise on the part of the Court to make appropriate arrangements for the eradication of the violation.[187] The Court has thus allowed those with information and expertise the time to devise and submit to the Court plans on how they intend to eradicate the violation.

Again, like the High Court, the Constitutional Court has used the structural interdict in those cases where there is evidence of lackadaisical conduct on the part of the government. In *Sibiya and Others v DPP,*[188] for instance, the Court was concerned that the process of substitution of death sentences in accordance with the *Makwanyane* case[189] had taken far too long.[190] The Court therefore deemed the structural interdict appropriate in the circumstances.

185 *TAC* case para 104.
186 See *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 96.
187 *August and Another v Electoral Commission* 1999 4 BCLR 363 (*August* case) para 39.
188 2005 8 BCLR 812 (CC) (*Sibiya* case).
189 *S v Makwanyane* 1995 3 SA 391 (CC), a case where the death penalty was found to violate the rights to life and human dignity.
190 *Sibiya* case (n 188 above) para 60.

Government was ordered to take immediate steps to ensure that all sentences of death imposed before 5 June 1995 are set aside and replaced by an appropriate alternative sentence. The government was also required to report to the Court not later than 15 August 2005 on all the steps taken to comply with the order above.

The *Sibiya* case is important in a number of respects. First, it shows the extent to which the Constitutional Court is prepared to ensure compliance with its orders in the face of lackadaisical conduct. It is evidence of the fact that, where the government fails to act in a timely manner in the face of a structural interdict, the Court is prepared to continue to engage the government until full compliance is obtained. This is because, as argued above,[191] in some cases it is only after several rounds of engagement that government may fully comply. In this case, instead of filing the report before 15 August 2005, the government on 12 August 2005 filed an application for extension of the time for filing the report.[192] The Court allowed the application and extended the time to 15 September 2005. Thereafter, however, even with the defects detected in the report filed on 15 September 2005, the Court still granted the government more time to rectify the defects and file another report by 7 November 2005. However, the November report was also not impressive to the extent that the sentences of some 28 people had not been substituted. A further extension was given to the government to file an additional report by 15 February 2006. Yet the February report still had names of persons whose sentences had not been substituted, which attracted a further extension to 15 May 2006. The May report was also not fully compliant as the sentence of one person had not been substituted. This led to a further extension up to 1 September 2006, but before 1 September 2006 the government reported that all sentences had been substituted.

This case shows how a structural interdict can lead to rounds of engagement between the court and the government. This is because, as mentioned above,[193] full compliance may be achieved only after a series of engagements. The court and interested parties must therefore be patient and be prepared to engage the government on more than one occasion. The case is also important because at the end the Constitutional Court made some observations that could inform the procedures that ought to be followed when courts deem supervisory jurisdiction appropriate. These procedures are also relevant in developing a comprehensive set of norms and principles

[191] Sec 6.3.1.8
[192] See *Sibiya and Others v DPP, Johannesburg High Court and Others* 2006 2 BCLR 293 (CC) (*Sibiya* case 2).
[193] Sec 6.3.1.

for the structural interdict. The Court observed that the supervisory process in the case had shown the following:

> (a) Successful supervision requires that detailed information be placed at the disposal of a court.
>
> (b) Supervision entails a careful analysis and evaluation of the details provided.
>
> (c) Supervision cannot succeed without the full co-operation of others in the process.
>
> (d) Courts should exercise flexibility in the supervisory process.[194]

The Constitutional Court and structural interdicts in socio-economic rights cases

The willingness on the part of the Constitutional Court to exercise supervisory jurisdiction contrasts in civil and political rights cases and socio-economic rights cases. The Court has been very reluctant to use this form of relief to enforce socio-economic rights. This reluctance has been inspired by what the Court considers to be a need to maintain the divide between itself and the other branches of the state as dictated by the doctrine of separation of powers. For the sake of maintaining the boundaries of separation of powers, the Constitutional Court has conceptualised the structural interdict as a remedy that should be used as a last resort. The Court has also been sceptical about the structural interdict in socio-economic rights cases because of its reluctance to be involved in protracted litigation and implementation of its orders. The Court does not want to be dragged into long and unending battles for socio-economic rights. According to one commentator, the Court would like to be 'a "one-stop-shop" in resolving these cases — they do not want to look at a case again once they have decided on it'.[195]

According to Davis, '[t]he less the burden on the Constitutional Court to exercise supervision over the executive, the more comfortable it feels'.[196] There is an indication that the remedy has been reserved for those cases where there is recalcitrance on the part of government to implement the directions of the Court. However, the Constitutional Court has been ambivalent in determining the

194 See *Sibiya and Others v DPP, Johannesburg High Court and Others* [2006] ZACC 22 para 22.

195 S Khoza 'The importance of a dialogue on strategies to promote socio-economic rights in South Africa' (2006) 7 *ESR Review* 6 9. However, unlike the approach of the minority in the Canadian case of *Doucet-Boudreau*, the Constitutional Court has not radically rejected the structural interdict on the basis of such principles as *functus officio*. Instead, it has left its use open as a remedy that could be granted in 'deserving cases'.

196 Davis (n 3 above) 304.

existence of such recalcitrance in socio-economic rights cases. Some members of the Court hold the view that if the political will is lacking, there is no guarantee that even structural interdicts will be effective. According to the former Chief Justice, Arthur Chaskalson, if there is not the political will, supervisory orders are not likely to be effective and may drag courts into long drawn-out battles that could more appropriately and more effectively be fought on the political terrain. In Chaskalson's view, those battles should be fought first and, if successful, the results are likely to be more effective than attempts to secure compliance through court supervision. The retired Chief Justice adds that a structural interdict may be necessary in a particular case to ensure that relief granted is effective relief; for instance if there is deliberate failure to heed a declaratory order or other relief granted by a court. 'But it should be a last resort and not a routine response to claims for the enforcement of socio-economic rights.'[197]

This appears to be the basis upon which the Constitutional Court rejected and set aside structural interdicts granted by the High Court in the *Grootboom* and *TAC* cases. The Court also declined to comment on the structural interdict that had been granted by the High Court in *Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another* (*Modderklip* case).[198]

The Constitutional Court's reluctance to use the structural interdict in socio-economic rights cases has generated condemnation and castigation of the Court as undermining the socio-economic rights in the Constitution.[199] This is because it has left court orders powerless in the face of government recalcitrance. According to Davis:

> [T]he Court's … refusal to grant structural relief that would empower courts to supervise the implementation of their own orders has produced unfortunate results. Litigants have won cases and government has done little to produce the tangible benefits that these litigants were entitled to expect from their success. The Court, in effect, has surrendered its powers to sanction government inertia and, as a direct result, litigants

[197] Former Chief Justice Arthur Chaskalson's speech 'Implementing socio-economic rights: The role of the courts' delivered as guest speaker at the 3rd Dullah Omar Memorial Lecture organised by the Community Law Centre and the Faculty of Law at the University of the Western Cape, 13 June 2006 31. See also Bilchitz (n 41 above) 165.

[198] 2005 8 BCLR 786 (CC).

[199] See D Bilchitz 'Health' in S Woolman *et al* (eds) *Constitutional law of South Africa* (1996) 56A-i 56A-24. See also M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the *Treatment Action Campaign* case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 312; Swart (n 95 above); and Bilchitz (n 41 above) 151.

> have not obtained the shelter or drugs that even a cursory reading of the judgments promised.[200]

Davis also submits that the reluctance of the Court to exercise any form of tangible control over the process of implementation has already had negative consequences for successful litigants. In his opinion, the order in the *Grootboom* case, for example, did not contain any time frames within which the state had to act. The result is that, more than three years later, there has been little visible change in housing policy to cater for people who find themselves in desperate and crisis situations. According to Davis, exercising supervisory jurisdiction in socio-economic rights cases would have saved the time and expenses that the parties would have to endure to challenge state action through filing fresh suits.[201]

The Constitutional Court's reluctance to exercise supervisory jurisdiction in socio-economic rights cases, just like its rejection of the minimum core obligations approach, appears to be rooted in the need to preserve the boundaries of separation of powers. The Court has been particularly cautious to defer to the executive branch as regards issues of budgetary allocation.[202] On those instances when it has risen to the occasion to interpret the rights, it has also been keen to push the cases out of its doors as soon as possible. This would not be possible if jurisdiction were retained as the Court would have to engage in budgetary issues in the course of its supervision. This could be one of the factors that explain the ambivalence of the Constitutional Court, which also explains its differentiated approach as regards civil and political rights litigation when compared to socio-economic rights litigation. For instance, while affirming its powers to make a structural interdict in the *TAC* case, the Court cautioned that due regard must be paid to the roles of the legislature and the executive in a democracy.[203]

In order to show what it deems due deference to the other branches of state, the Court has, even in the face of government recalcitrance, struggled to convince itself that government would comply with its orders in good faith. In the *TAC* case, for instance, the Court declined to grant the structural interdict because in its opinion 'the government has always respected and executed orders of this Court' and that there was 'no reason to believe that it will not do so'.[204] This conclusion appears to have been motivated by evidence that emerged during the hearing that the government had 'made

[200] Davis (n 94 above) 6.
[201] D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* 510.
[202] See ch three sec 3.2. See also generally Davis (n 3 above).
[203] Para 137.
[204] Para 129.

substantial additional funds available for the treatment of HIV, including the reduction of mother-to-child transmission'.[205] However, this evidence blinded the Court to the high degree of recalcitrance demonstrated by the state during the hearing of the case, particularly the declaration by the Minister of Health that the government would not respect the judgment of the Court.[206] Recalcitrance in addition to the seriousness of the matter in issue, saving innocent babies from a deadly disease, was justification for the issuance of a structural interdict.[207] This matter was especially serious because of the lackadaisical approach of the government in tackling the problem of HIV/AIDS. As already observed above, the policy of the government in relation to HIV has been notable for its very slow progress in coming to terms with the health crisis facing the country. There has indeed been a tremendous amount of bungling and a high degree of reluctance expressed to provide Nevirapine.[208]

At the very least, the Constitutional Court should have retained jurisdiction, without requiring that a report be filed by a stated date. The Court could have left itself open to whichever party wanting to contest the manner in which the order was being implemented.[209] The mere fact that the Court retained jurisdiction over the case could have propelled the government to act more cautiously because of the knowledge that any deleteriousness would easily be brought to the attention of the Court and might also spark media frenzy.[210]

The Court would have only graduated into more specific and detailed directions on the basis of the evidence brought to it by those who would have come back to it, and by the attitude of the government. Though this may have exposed the Court to protracted litigation, a thing that the Court wanted to avoid, it would have been beneficial in many respects. It would have demonstrated that, in cases dealing with serious matters and where recalcitrance is detected, the Constitutional Court would engage with a case until its orders are implemented. The retention of jurisdiction would have

205 Para 120. The evidence indicated an increment in the HIV treatment budget from R350 million to R1 billion, which would increase to R1,8 billion the following year.

206 See Bilchitz (n 35 above) 23-24.

207 Budlender has submitted that one of the indications of whether a structural interdict is appropriate is the risk of severe consequences, such as loss of life, even in the case of good faith failure on the part of government to comply with its obligations. G Budlender 'Justiciability of socio-economic rights: Some South African experiences' in Y Ghai & J Cottrell (eds) *Economic, social and cultural rights* (2004) 358. See also D Bilchitz 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* 4.

208 Bilchitz (n 207 above) 23-24.

209 Unlike the declaration in the *Grootboom* case, this would not have caused any confusion, as the order made in this case was a clear mandatory direction as to what had to be done.

210 See sec 6.3.2 above for a discussion of the impact of retention of jurisdiction on the defendant.

further enabled the Court to continue to engage in dialogue with the state as regards the mechanisms of policy implementation.[211] There is no better way than this approach in which the court could have engaged the government in a constitutional dialogue. Indeed, the courts can only engage in dialogue between themselves and the other organs of state in litigation before them. Once the litigation is closed, the dialogue is also automatically closed.

Dialogue between the government and the courts is justified, among others, by the fact that not so many cases have been filed before the Constitutional Court since the Constitution was adopted. It is therefore important that the Court takes full advantage of those cases before it to engage in full dialogue with the other organs of state. This can only be done effectively if supervisory jurisdiction is retained. Another opportunity to engage in such dialogue may arise only after a considerably long time. It is, for instance, over eight years since the *TAC* case was heard. Yet, in spite of the contentions surrounding the problem of HIV/AIDS and the response of the government towards the same, the Court has not had another opportunity to engage in dialogue on this problem.

The Olivia case — A big stride forward

The recent case of *Occupiers of 15 Olivia Road and Others v City of Johannesburg and Others* (*Olivia* case)[212] has highlighted the benefits which the Constitutional Court could derive from granting structural interdicts in socio-economic rights cases. This case was instituted in the High Court at Johannesburg by more than 400 occupiers of two 'bad' buildings in Johannesburg to resist their eviction, which was scheduled to take place in pursuit of the City of Johannesburg's regeneration program. The regeneration programme was intended to revamp the city by, amongst others, rehabilitating all bad buildings. The High Court had held that the City's programme fell short of the requirement to provide suitable relief for the people in the city who were in a crisis or in desperate need of housing. The Court interdicted the eviction. On appeal to the Supreme Court of Appeal,[213] the Court found the buildings to be unsafe and authorised the eviction of the

211 Davis (n 3 above) 312.

212 Case CCT 24/07 [2008] ZACC 1. For a discussion of the history of this case, see L Chenwi & SLiebenberg 'The constitutional protection of those facing eviction from bad buildings' (2008) 9(1) *ESR Review* 12.

213 See *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 6 SA 417; 2007 (6) BCLR 643. For a discussion of this case, see G Quinot 'An administrative law perspective on "bad buildings" evictions in Johannesburg inner city' (2007) 8(1) *ESR Review* 25; and C Mbazira 'An overview of the Constitutional Court hearing of the inner-city evictions case' (2007) 8(3) *ESR Review* 12.

occupiers and ordered them to vacate.[214] The occupiers appealed to the Constitutional Court against their eviction. In the course of hearing the case, the Constitutional Court ordered what would be described as 'an interim structural interdict'. It was directed that the parties 'engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application'. The parties were also ordered to file affidavits before the Court on or before 3 October 2007 reporting on the results of the engagement between them as at 27 September 2007.[215] The approach was justified on the basis of the fact that the City had an obligation to engage vulnerable people before making decisions that adversely affected them. The Court held that the City had a constitutional obligation to provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government. According to the Court, the City also had the obligation to fulfil the objectives mentioned in the Preamble of the Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person'.[216] On the basis of this, the Court's summation was that a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations as set out in this paragraph.[217]

The significance of the *Olivia* case lies in the fact that, besides being the precursor of interim relief, the structural order made in the case provided interim protection for the applicants against eviction. The engagement process resulted in an agreement on interim measures by which the City agreed to take steps to render the buildings safer and more habitable. This was to be achieved amongst others by the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags and the installation of fire extinguishers. There was a time frame of 21 days agreed on within which these things were to be done.[218] The Court found this agreement to be 'a reasonable response to the engagement process' and commended the City for being more humane.[219] Furthermore, as is demonstrated below, the approach of the Court in promoting dialogue has the potential of obtaining meaningful

[214] The Court, though, ordered the provision of alternative accommodation by relocation to a temporary shelter of those in desperate need of housing.

[215] Para 5. The Court found justification for this order in the advantages of attempting to resolve a dispute amicably. The Court referred to a number of judicial decisions to justify this. These included the *Grootboom* case and *Port Elizabeth v Various Occupiers* (*Port Elizabeth* case) 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 39.

[216] *Olivia* case (n 55 above) para 16.

[217] As above.

[218] *Olivia* case (n 55 above) para 25.

[219] *Olivia* case (n 55 above) 28.

enforcement of the court orders with the least involvement of the court. Indeed, all the parties involved in the case have generally expressed their satisfaction with the implementation of the order. The buildings were not only made more habitable, but relocation of occupants took place in a humane manner which, has not rendered persons homeless.[220]

In my opinion, the *Olivia* and *Sibiya* cases show that the Court is willing to be guided by some norms and principles on how to exercise supervisory jurisdiction. The principles in these cases, however, need to be developed and applied consistently and in a broader manner. Indeed, the principles in the *Sibiya* case thus far address only one aspect of the structural interdict: the supervision process. Yet, the *Olivia* case does not define any principles by which the decision to grant the relief is guided. There is therefore a need for a comprehensive list of norms and principles that address not only the supervision process, but also the process of determining when the relief is appropriate. This is what the next section sets out to do.

6.6 Norms and principles for the structural interdict

It is important that the structural remedial process adheres to certain norms and principles if it is going to achieve its purpose and forestall some of the criticisms that have been directed at it. These norms should, by their nature, be capable of application in a number of contexts. The norms include the utilisation of the structural interdict in a graduated manner as a remedy of last resort, participation of all stakeholders, impartiality and independence, reasoned decision making; remediation which complies with the substantive norms[221] and flexibility.

Roach and Budlender should be commended for defining some of the principles that could guide the courts in determining when a structural interdict is an appropriate remedy.[222] They argue that the remedy should be granted where there is evidence to believe that the government may not comply promptly. The same applies to those cases where the violation arises from 'neglect, inadequate budgets and inadequate training of public officials'.[223] This is in addition to those cases where the consequences of 'even a good-faith failure to comply with a court order is so serious that the court should be at

220 See C Mbazira 'You are the "weakest link" in realising socio-economic rights: Goodbye. Strategies for effective implementation of court orders in South Africa' (2008) Socio-Economic Rights Project, Community Law Centre Research Series 3 19.
221 Sturm (n 63 above).
222 Roach & Budlender (n 93 above).
223 Roach & Budlender (n 93 above) 349.

pains to ensure effective compliance'.[224] The other circumstance where Roach and Budlender reckon a structural interdict appropriate is where there is evidence of government's incompetence or lack of capacity to provide for the rights: 'The greater the degree of the government's incompetence or lack of capacity to provide for the rights, the stronger the case for supervisory jurisdiction including requirements that government submit a plan and progress reports for the court's approval.'[225] While I find Roach and Budlender's article very useful in defining principles guiding the grant of a structural interdict, I find it incomprehensive in this regard. There are a host of other norms and principles that could guide the court in using the structural interdict, as discussed below.

6.6.1 Utilisation as a remedy of last resort in a graduated manner

Execution by the courts of administrative functions, deemed to be the preserve of the executive organ of the state, amounts to the substitution of executive with judicial discretion. Fletcher has submitted that such substitution becomes legitimate only when the political bodies that should exercise that discretion are 'seriously and chronically in default'. He contends that as long as those political bodies remain in default, judicial discretion may be a necessary and legitimate substitute for political discretion.[226] On a similar note, Eisenberg and Yeazell submit that courts usually intervene in institutional cases not so much to take affirmative action in conflict with the other branches of government. In their opinion, such intervention is justified by the need to fill a vacuum which the other branches have created due to inaction or neglect.[227]

It is also on the basis of the above that one could determine whether or not the court should intervene in what may be considered administrative or policy matters. Greater judicial intrusion is, therefore, only warranted if there is a failure by the other organs.[228] This notwithstanding, the courts should ascertain in the first place whether there is still any chance of using the executive or legislative discretion to eliminate the constitutional violation and to fill the vacuum. If this is still possible, intervention by substitution of discretion will not be justified. The court's initial response should be

224 Roach & Budlender (n 93 above) 333.
225 Roach & Budlender (n 93 above) 349.
226 Fletcher (n 71 above) 637.
227 Eisenberg & Yeazell (n 71 above) 495-496. See also Horowitz (n 133 above) 2 24, who submits that one reason for judicial involvement in social policy matters has arisen from the reticence of other policy makers. In his opinion, sometimes, though a judicial decision on these issues may be imperfect, it may be the best that is available.
228 Special Project (n 66 above) 823.

aimed at procuring the government to exercise its discretion in a manner that eliminates the violation. The government should be given an opportunity to demonstrate the plans it intends to follow to eliminate the violation. The court could also require the parties to negotiate a plan and report back to it. It is only when all these attempts fail that the court should intervene by taking administrative decisions.[229]

The courts should, therefore, exercise what has been described as 'remedial absentation'.[230] A court exercising remedial absentation merely retains jurisdiction to stop the infringement while allowing the state to formulate a remedial plan indicating how it intends to end the infringement. At this stage, the court should only order the defendant to produce a plan for judicial evaluation. The order may be accompanied by guidelines suggested by the court. This is important because a defendant making a good-faith attempt may need guidance, but also a recalcitrant defendant will produce an inadequate plan unless closely instructed.[231] As mentioned above,[232] this approach is important because it limits judicial involvement in what may be viewed as policy matters. Additionally, it allows the court to harvest the special expertise of the defendant and to secure co-operation in this regard. Remedial absentation should be contrasted with judicially imposed remedies, which are formulated without the benefit of the expertise or skills of the parties and may be considered to be intrusive.[233]

Roach and Budlender suggest that in some cases it may be appropriate for the court to require the government to report to the public on the steps it plans to take to comply with the Constitution. In their opinion, such reporting would make it possible for civil society and political organisation to monitor compliance.[234] This is a softer remedy in comparison to requiring the government to report to the court. In such circumstances, the court cannot be accused of being undemocratic and breaching the doctrine of separation of powers. Roach and Budlender contend that a court that requires an elected government to communicate with its citizens about important matters of governance and steps taken to comply with constitutional rights cannot reasonably be criticised for being undemocratic or infringing the separation of powers. This is because reporting to the

229 The United States experience shows reluctance on the part of the courts to devise the remedial plans themselves. Instead, the parties were themselves required to do so. The courts only imposed plans where the parties had failed to come to an agreement. See Chayes (n 62 above).
230 Special Project (n 66 above) 796.
231 Special Project (n 66 above) 798.
232 Sec 6.3.2.
233 Special Project (n 66 above) 800.
234 Roach & Budlender (n 93 above) 346.

public is simply a reasonable and democratic means of ensuring proper compliance with the Constitution.

It should be noted, however, that there could be circumstances where a judicially-imposed remedy is needed. This occurs in those cases where it is necessary to immediately alleviate an intolerable condition or where the case implicates non-systemic aspects susceptible to immediate relief. Even then, the court may be forced to combine judicial imposition with remedial absentation. The *Westville* case is an example of this: The Court ordered that the applicants be provided with ARVs immediately in addition to the state filing a plan on how it intended to comply with the Court's order. Immediate relief was provided to the applicants and a long-term remedy was sought for similarly-situated people. This made it possible for the benefits to be provided even when an appeal had been lodged.

6.6.2 Participation

Whatever the form taken by structural litigation, the court must ensure that those affected by the litigation participate in the remedy formulation process. Such participation has many advantages, especially as regards the implementation of the remedy and attendance to polycentric interests implicated by the case. Chayes has submitted that public law litigation, because of its widespread impact, seems to call for adequate representation in the proceedings of the range of interests that will be affected by them. In Chayes's opinion, at the stage of relief in particular, if the decree is to be quasi-negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance, not only from the point of view of the affected interests but from that of the system itself.[235]

The participation should focus on individuals, groups or organisations whose interests may be affected by the case.[236] In the context of government as the defendant, it may be necessary to ascertain the interests of other spheres or departments of government. In the semi-federal nature of South Africa, national, provincial and local government interests may be invoked in the case. The case may also implicate constitutional competences of these

[235] Chayes (n 62 above) 1310. According to Horowitz (n 133 above) 23, the fact that there are fewer participants in the adjudicative process than in the legislative process makes it easier for judges than for legislators to cut through the problem to a resolution. In his opinion, it is precisely this ability to simplify the issues and to exclude interested participants that may put the judges in danger of fostering reductionist solutions.

[236] Sturm (n 63 above) 1410.

spheres of government as regards the provision of social goods and services.[237] Ignoring these interests and competences may affect the efficacy of the remedy obtained and may lead to the imposition of remedial burdens that fall outside a government sphere's constitutional mandates. Involvement of a wide range of stakeholders is also necessary in securing collaboration between the different spheres or departments of government and the different stakeholders in the remedial process. It is also important to note that government programmes often consist of partially co-ordinated outputs of a number of departments and organs of state. In addition to the state actors, there could be non-state actors such as trade unions and organised groups that influence the direction of the government programme.[238] It is prudent that these actors be consulted if practicable.

Sturm has suggested that the forms of interaction used in the decision-making process should promote involvement, co-operation and consensus. He suggests further that the process should also mitigate the unequal power, resources, and sophistication of participants.[239] This is important because it establishes equality of participation in the process and encourages parties to bring to the fore their interests without fear. It is particularly important with regard to socio-economic rights because of the imbalance of power which usually exists between poor and marginalised communities and powerful government or other artificial entities.

It is also vital that institutional reform includes identification of the various groups and entities whose co-operation is necessary. This is in addition to ascertainment of the needs and interests of those groups and entities, and assessment of the likely impact of any proposed reforms on their interests.[240] The involvement of a wide variety of participants increases the number of alternative remedial proposals before the court.[241] Participation will also allow all the stakeholders to be educated on the nature of the case, the remedial

[237] See schedules 4 and 5 of the Constitution for the competences of the different levels of government. See also C Mbazira *Realising socio-economic rights in the South African Constitution: The obligations of local government. A guide for municipalities* (2006).
[238] Note (n 68 above) 433.
[239] Sturm (n 63 above) 1410.
[240] Note (n 68 above) 433.
[241] Special Project (n 66 above) 804.

plan, and its likely impact. If crucial stakeholders misunderstand the remedy, implementation may be grounded simply because they do not know both what to do and the objectives to be realised:[242]

> When those excluded complain, often justifiably, that their position has not received a fair hearing, political as well as bureaucratic obstacles to implementation are often created. Thus, in order to minimise opposition to implementation, it is advisable to invite the participation at the decree formulation stage of relevant non-parties ... Participation by such nonparties may have another advantage: they may raise policy and implementation factors overlooked by the plaintiffs and defendant administrators yet pertinent to the shaping of the decree. The court can employ various procedural devices to promote this expanded participation, such as inviting groups whose interests may be affected by the decree to file *amicus* briefs or, if necessary, to intervene at the remedial stage.[243]

However, the remedial process should not be diluted by participation to the extent that effective remediation and reasoned decision making are lost. As discussed below,[244] reasoned decision making is another norm that has to be promoted by structural litigation.[245] So too is effective remediation. The consensual remedial model, as discussed above,[246] appears to be the most suitable for realising the norm of participation. This model may, however, sacrifice reasoned decision making and effective remediation. Nonetheless, this depends on how the process is conducted and the oversight role played by the court. The court could direct the parties on agreements that are based on reason and may reject those that do not realise effective remediation. Participation should also not be allowed to unnecessarily slow down the remedial process.[247]

6.6.3 Impartiality and judicial independence

Impartiality and judicial independence is a norm to be preserved in all forms of judicial processes. The need for impartiality accords legitimacy to the judicial process and plays a very important role in producing remedies that are acceptable not only to the parties but to the public at large. However, the need for impartiality and

242 According to Note (n 68 above) 440, in the United States case of *Mills v Board of Education* 343 F Supp 866 (DC 1972), teachers and school principals who did not participate in the decree formulation process substantially delayed implementation of due process standards relating to student discipline in part because they misunderstood and exaggerated what the new rules required.

243 Note (n 68 above) 440.

244 Sec 6.6.4.

245 Sturm (n 63 above) 1418.

246 Sec 6.3.2.

247 Special Project (n 66 above) 812 submits that rather than slow down the process, participation produces the opposite result. This is because of the fact that it produces an acceptable remedy which makes implementation much easier.

independence in structural litigation is not only relevant but also complex. This is because of the active role played by the judge, not only in formulating the remedy but also in its implementation. The judge's task may appear to be administrative and continuously involve the judge in the reform process. Such participation may, however, threaten the judge's independence and impartiality. It is for this reason that a warning has been sounded to the effect that to some extent this threat is tied to a peculiar characteristic of the structural remedy, which places the judge in an architectural relationship with the newly reconstituted state bureaucracy. The approach may force a judge to identify with the organisation he or she is reconstructing, and this process of identification is likely to deepen as the enterprise of organisational reform moves through several cycles of supplemental relief, drawn out over a number of years.[248]

Nonetheless, the opinion above should be qualified. It is only true in those cases where the same judge has been involved with an institution for a considerably long time and has discharged functions that place him or her in an adminstrative position in that institution. Yet the judge could still use his or her judicial training to distance him or herself from the institution. This may not be easy, though; the judge must strive to ensure that his or her decisions are fair, unbiased and supported by facts that are related to the legal problem in issue.[249] Judicial independence would also allow the judge to make judicial orders, without interference, on the basis of legal standards and norms. It therefore remains the duty of the court not only to assert its independence, but to avoid being unnecessarily involved in tasks that would undermine this independence. Where remedial decisions can be made by a political organ, this should be considered as a measure of first resort, and judicial usurpation of the process as a matter of last resort. This is not to ignore the fact that in some cases it may be plainly clear that the political processes have failed and court assumption of the task is the only reasonable thing to do. Even then, the political process should be given a second chance though under the supervision of the court.[250]

248 Fiss (n 65 above) 53.
249 Sturm (n 63 above) 1410.
250 It is also important that the court guards against losing its impartiality when it defers remedial selection to the parties. Sturm (n 63 above) 1412 has submitted that deference to the defendants does not afford all relevant participants an opportunity to participate in the development of the remedy. Sturm argues that this may create the appearance of favouring the interests of the defendant over the interests of those entitled to the remedy. It is, therefore, important that all the affected parties be involved in the remedial decision-making process through participation as discussed above (sec 6.6.2). If the defendant has been ordered to produce a remedial plan, all affected parties should be accorded sufficient opportunity to comment on the plan, or even to contest it in court.

The expert model has the potential to serve the norm of judicial impartiality and independence.[251] So may the consensual remedial formulation model. The expert model enables the court to maintain a disinterested posture with respect to the remedy ultimately proposed. Fiss contends that the expert is used as an intermediate structure that stands between the judge and the institution, on the one hand, and on the other hand between the judge and the body politic.[252] Nevertheless, it is not necessary for the court to give itself a posture of complete disinterest considering the fact that it is the bearer of the ultimate obligation to devise an effective remedy. Even when it delegates the obligation to an expert, the expert is, for all intents and purposes, deemed to be a representative of the court.[253] The court must ensure that the remedy, whether devised by the expert or by the court itself, enforces the substantive legal norms. Also, as seen above,[254] the expert model inherently exposes the expert to perceptions of partiality on his or her part, especially where participation is not guaranteed to its fullest. The contention has been that judges have appointed masters, monitors and receivers to help design interdicts and to oversee their implementation. These appointees are not judges and therefore neither their training nor role necessarily assures the habits and capacities required for the kind of disciplined impartiality we expect of judges.[255]

Nagel contends further that judges cannot be counted on to correct any bias in the formulation of the decree because the facts in the expert's report are traditionally only alterable if clearly erroneous.[256] In my opinion, however, the possibility of bias can be overcome if the judge keeps a close eye on the expert and requires periodic updates. The courts should also take care not to appoint experts that are close to the interests of one of the parties. In some cases, it may serve the interests of justice if more than one expert is appointed; a panel of experts as opposed to an individual expert is less likely to be biased. But this does not mean that all cases merit the appointment of a panel. The magnitude of the task to be accomplished should also be a factor to consider in deciding whether or not a panel as opposed to an individual expert should be appointed.

251 Sec 6.3.2.
252 Fiss (n 6 above) 56.
253 Fiss (n 6 above) 56 warns that if the expert is not treated as being a representative of the court, the very reason why the remedial process was entrusted to a judge in the first place be defeated. In his opinion, the expert would in effect now become an administrative agency, created not by the legislature or the executive, but by the judge.
254 Sec 6.3.
255 Nagel (n 136 above) 403-404.
256 Nagel (n 136 above) 404.

6.6.4 Reasoned decision making

One of the criticisms levied against structural litigation is that it sacrifices reasoned decision making and exalts remedies reached by consent.[257] It is therefore necessary for structural remedies to be based on reasoned decision making. Structural litigation should be conducted with open awareness of the fact that the litigation implicates interests beyond those of the parties. The court should determine whether the case negatively impacts on interests other than those of the parties. In addition to this, however, the court should support its decisions with legal norms and standards in the form of normative standards established, for instance, in the Bill of Rights.[258] This is where reasoned decision making becomes relevant as reflected in the way the judge interprets and applies the normative standards in issue.

The judge has to justify his or her decision as based on the law. This forestalls accusation that the judge has applied his or her own value judgment to decide the case. Reasoned decision making in structural litigation terms, therefore, gives legitimacy to judicial intervention as being based on legal norms and the need to solve systemic problems. When remedies are based on reasoned decision making, they accord legitimacy to the process, which translates into acceptance of the directions issued by the court.

The expert remedial formulation model is more capable of realising reasoned decision making in comparison to the bargaining and legislative hearing models. Usually, the court-appointed experts come with technical expertise and a capacity to gather and assess large quantities of information. In spite of this, whether a case requires an expert model of remediation should depend on the circumstances of each case. If a case has many technical aspects which need to be assessed before an effective remedy is crafted, it will definitely need expert help. But if a case merely requires ascertainment of some factual aspects, the hearing model and not the expert model may be the most appropriate. Reasoned decision making should, therefore, not be exalted blindly by appointing an expert without first considering the circumstances of the case.

Finally, it should be noted that reasoned decision making also promotes the principle that aims at ensuring that remediation

[257] Fiss (n 105 above) 1083. See also Horowitz (n 133 above) 22.

[258] However, this does not mean that the court cannot disgorge the remedy from the normative standards if the demands of the case so require. I have submitted in ch four that, while the court should design its remedies to maximise the right in issue, this does not mean that it cannot separate right and remedy if this is what is appropriate (sec 4.3.2).

complies with the substantive norm as discussed in the next subsection. The substantive norm is the law that protects the right(s) in issue.

6.6.5 Remedy that complies with substantive norms

The reason why people litigate is to enforce their rights. The remedies must, therefore, as much as possible, be intended to realise the rights. Nonetheless, as mentioned in chapter four,[259] in certain cases the interests of justice may require that the remedy granted is not one that is necessarily capable of realising the right in full.[260] This does not mean, though, that the court should completely abandon the need to develop the substantive rights as protected.

It is advisable that the court begins by detailing the normative standards implicated by the right. In the context of socio-economic rights, this approach would help to give content to the rights. This is important because, as I have submitted in chapter three,[261] the Constitutional Court is yet to give substantive content to the socio-economic rights in the Constitution. Giving substantive content to the rights will help the court and the parties to understand what they are working towards. The remedies will also be structured with these objectives in mind. The normative content also provides a basis upon which the efficacy of the remedies selected can be criticised and evaluated. The court will also use these normative standards to ensure that its model of supervision is the most effective in terms of realising the objectives of the substantive norms.

6.6.6 Flexibility, monitoring and supervision

In litigation challenging systemic violations, the court may usually embark on a remedial process without full knowledge of the requisite facts, interests and obstacles that may impact on the implementation of its order.[262] The necessarily speculative nature of this enterprise means that no single order can be regarded as final. Additionally, implementation of the remedy may continue for a long time.[263] This is because the judge must search for the best remedy and his judgment must incorporate such open-ended considerations as effectiveness and fairness, which always leaves the remedy open to revision. This could happen even without the strong showing traditionally required for modification of a court order; a revision is

[259] Sec 4.2.2.
[260] See also ch five sec 5.2.1.
[261] Sec 3.2.2.
[262] Sec 6.3.1.
[263] Special Project (n 66 above) 789.

justified if the remedy is not working effectively or is unnecessarily burdensome.[264]

It is therefore important that the court proceeds with flexibility and crafts its order in a manner that allows easy adjustment should the need to do so arise.[265] The need to revise the order is also made inevitable because of the detailed nature of structural orders and sometimes because of the lack of judicial expertise in drafting some of them, since some are drafted by experts with no judicial background.[266]

The court may also have to closely monitor the implementation of its order and obtain information that may be needed to make adjustments in the remedial standards should the need to do so arise.[267] This can only be achieved if the court retains jurisdiction and assumes an active oversight role.[268] The court should, however, be careful not to interfere with the implementation process if it is not necessary to do so. Although the parties should be relied on for information and the need for adjustments, the court should be careful not to be distracted by parties who may be interested in protecting their interests at the expense of other equally important interests. Plaintiffs may underplay the degree of compliance, while the defendants may exaggerate it. All this may distract the remedial process.

The need to adjust the order may also arise, for instance, when it transpires during the implementation period that the defendant cannot successfully implement the order without the co-operation of persons or departments not party to the original suit.[269] Other participants whose co-operation is needed may include, for instance, different spheres of government. In such event, notice should be served on the third party participants, with a view of determining whether they are opposed to the order and the likely impact that it may have on their activities. In other cases it may be merely necessary to widen the geographical scope of the order. Yet in some

264 Fiss (n 65 above) 49 also notes that it is this that explains the fact that specificity usually comes at a late stage of the remedial process. The judge will begin with very broad remediation and gradually move to specifics.

265 See the *Doucet-Boudreau* case (n 154 above) 68. In the *TAC* case, the Constitutional Court observed that a factor that needs to be kept in mind is that policy is and should be flexible and that court orders concerning policy choices made by the executive should not be formulated in ways that preclude the executive from making such legitimate choices (para 114).

266 Most structural orders arise from negotiated settlements and the court may not be able to anticipate the impact of every aspect of the orders. It is, therefore, fair that the judge oversees the implementation of the order to be able to make adjustments should the need to do so arise.

267 Note (n 68 above) 440.

268 See Special Project (n 66 above) 817.

269 Special Project (n 66 above) 818.

adjustments of the order may be motivated by changed legal standards, especially following decisions of higher courts or even legislative enactments.

6.7 Conclusion

There is no doubt that the structural interdict is the most creative of the remedies that have been designed in constitutional litigation. The structural interdict is especially useful as a response to violations that arise from structural settings and are caused by systemic problems.[270] The structural interdict is inspired by the ethos of distributive justice and seeks to adjust future behaviour and to tackle systemic violation at their root. The most prominent feature of this form of relief is the court's retention of jurisdiction and the provision of a complex regime of ongoing supervision of compliance with the court's order.[271] In spite of this, the structural interdict has not been without controversy. The biggest controversy arises from criticism that it amounts to a breach of the doctrine of separation of powers, because it allows courts to interfere in policy matters and to make decisions that have direct budgetary allocation implications.[272] However, it has been demonstrated that the judiciary has characteristics that may make it well suited for the task of enforcing constitutional standards, including such means as the structural interdict.[273] These include insulation from political pressures, capacity to gather information through non-bureaucratic processes and willingness to engage all affected parties.[274]

In spite of this, I have submitted in this chapter[275] that, while separation of powers and institutional competence concerns do not vitiate the legality of the structural interdict, they are a cause for concern and should not be ignored completely. The courts should, where appropriate, defer to the executive and legislative branches of government. They should only intervene by way of a structural interdict where the other branches are 'seriously and chronically in default' as regards the exercise of their discretion.[276] Even then, intervention should be graduated,[277] choosing first to merely retain jurisdiction and allow the state to tackle the constitutional violation.

[270] Liebenberg (n 60 above) 30.
[271] Chayes (n 62 above) 1298. See also Special Project (n 66 above) 812; Note (n 68 above) 433; and sec 6.3.1.above.
[272] Horowitz (n 133 above) 9 20. See also Frug (n 136 above) 739-740.
[273] See sec 6.4.1.
[274] See Sturm (n 63 above) 1408; Chayes (n 62 above) 1308-1309; and Note (n 68 above) 437.
[275] See sec 6.4.1 above.
[276] Fletcher (n 71 above) 637. See also Eisenberg & Yeazell (n 71 above) 495-496.
[277] See Fiss (n 6 above) 35-36; and Cooper-Stephenson (n 7 above) 36. See also secs 6.3.1 & 6.6.1. above.

This could be followed by a requirement to submit a report to the court and to the opposite party detailing the plan to eradicate the violation. Where necessary, the court may more intrusively devise the plan and supervise its implementation. It has been cautioned, though, that there could be cases that are of a very serious nature where a high degree of intervention is immediately necessary.[278]

In all these processes the court should ensure that all persons whose interests may be affected by the litigation process participate in the remedial formulation process to the extent that this is necessary and practicable.[279] The courts could use various models of the structural interdict, including the expert model and the legislative hearing model to realise this. The remedy should be flexible and the court should be prepared, if need be, to adjust it at any time.[280] The adjustments also allow the judge to find what is considered to be the most appropriate means of responding to the constitutional violation. This is because usually the structural interdict may begin as experimentation of several remedies, and perfection may only come after a number of adjustments.[281]

Sometimes the main issue is not when a violation is going to be uprooted. Rather, the issue is what steps are being undertaken to begin the uprooting process. In such a context, it is the direction and rate of change that may be important and not the final outcomes, as these may still be too far away.[282] Sometimes reform may be slow and almost viewed as amounting to failure, but this may be necessary to accommodate the unforeseen obstacles. A slow but steady process of uprooting the violation is far better than short-run artificial measures that may not overcome all the obstacles ahead. In this regard, a structural interdict is 'a process for setting ambitious but achievable targets and monitoring the achievement of those targets'.[283] Artificial or 'quick fix'-like measures, though dramatic, may stall or disappear in the long run. It is important that the court takes its time to study all the obstacles so that it is able to fashion long-term solutions to them. It is because of this that the US Supreme Court in the *Brown* case, for instance, initially merely ordered that the states act with all deliberate speed, and, as seen above,[284] advised the local courts to act with flexibility in their remedial exercise. This provided both the state and the courts with time to study the obstacles and to

278 *EN and Others v Government of RSA and Others* 2007 1 BCLR 84 (D) (*Westville* case) has been given as an example. In spite of this, one sees that the graduated response is still applied to a certain extent.
279 See Chayes (n 62 above) 1310; and Sturm (n 63 above) 1410.
280 See *Doucet-Boudreu* case (n 154 above) 68.
281 See Fiss (n 65 above) 49.
282 Frug (n 136 above) 790.
283 Budlender (n 170 above) 11.
284 See sec 6.3.

find solutions to them. It also illustrates the concern of a court to provide space for public authorities to implement a far reaching and contentious order in a gradual way.[285]

Finally, it is important that the court does not act in a way that would threaten its impartiality and independence, and reasoned decision making must be promoted as much as possible. This is important to enable the courts to weaken criticism that the structural interdict compromises the impartiality and independence of the judge because of his or her direct involvement in the administration of the institution that needs to be reformed. [286] The court may need to maintain reasoned decision making by basing its decisions on legal principles and established facts.[287] Reliance on established legal substantive norms will also help to advance the normative content of the rights that are being assessed.

[285] Davis (n 3 above) 322. Davis has likened this approach to the reasonableness review approach in the *Grootboom* and *TAC* cases which appears to accord deference to the executive. However, the distinction, he submits, is that the South African socio-economic rights cases were not as controversial as the *Brown* case.

[286] Fiss (n 65 above) 53.

[287] Sturm (n 63 above) 1411.

CHAPTER 7

CONCLUSION

Although the South African Constitution protects socio-economic rights as justiciable, their enforcement is still controversial. This is evident in defining the nature of the obligations these rights engender, and in finding and implementing relief to remedy their violation. I have demonstrated in this book the sources of some of these controversies, which include the normative (real and perceived) nature of socio-economic rights. In addition, there is the separation of powers-based concern.[1] Normatively, the realisation of socio-economic rights requires far more resources and yet, procedurally, the courts may not have the institutional capacity to deal with some of the issues to which the enforcement of these rights gives rise. These factors explain not only the approach of the South African courts in interpreting the obligations engendered by these rights, but also in determining the remedies that follow their violation. However, other than the nature of the rights, the approach of the courts, and particularly that of the Constitutional Court, also has been influenced by the notion of justice to which the courts are inclined. The Constitutional Court has inclined more towards the theory of distributive justice as opposed to corrective justice.

The purpose of this chapter is to draw conclusions emerging from the discussions of the factors as identified above. It also makes recommendations on how best the socio-economic rights in the Constitution can be enforced, and appropriate remedies found for their violation. The chapter is divided into three sections. The first section draws conclusions on the way the normative nature of the rights has influenced the remedies for their violation. The second section draws conclusions on the impact of separation of powers based concerns and how these could be overcome. The last section discusses the influence of the theories of justice in defining 'appropriate, just and equitable relief'.

1 Ch two.

7.1 Influence of the normative nature of the rights on remedies

The difficulties that courts face in devising remedies for socio-economic rights violations should be studied in relation to the normative nature of these rights. Some scholars, as seen in chapter four,[2] submit that rights and remedies must be kept separate, as the considerations in determining the nature of the two differ. In my opinion, however, rights and remedies are not two fundamentally different notions that have to be determined independently of each other. In developing appropriate, equitable and just remedies, the rights intended to be protected must constantly be had in mind. It is therefore not possible to study or critique remedies for socio-economic rights violations without understanding the normative nature of these rights and the obligations they engender.

There is no doubt that, just like civil and political rights, socio-economic rights are justiciable. Both categories of rights engender both positive and negative obligations and have budgetary implications.[3] In spite of this, as seen in chapter two,[4] it cannot be denied that the enforcement of socio-economic rights poses more difficulties in comparison to the enforcement of civil and political rights.[5] This is especially so as regards the enforcement of the positive obligations that socio-economic rights engender. These positive obligations call for substantial resources to realise, and give rise to separation of powers based concerns. Additionally, socio-economic needs also require to be prioritised since the available resources may not be adequate to meet all the needs.[6]

The fundamentally positive nature of socio-economic rights explains why the courts have not been as robust in finding remedies for these rights as they have been with regard to civil and political rights.[7] Civil and political rights are believed to require less positive

2 Sec 4.3. See O Fiss 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1; F Sager 'Fair measure: The legal status of underenforced constitutional norms' (1978) 91 *Harvard Law Review* 1212; and D Walker *The law of civil remedies in Scotland* (1974).

3 Ch two sec 2.3.

4 Sec 2.2.

5 See also F Coomans 'Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 2.

6 A Sachs 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in J Peris & S Kristian (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 144.

7 See P de Vos 'Pious wishes or directly enforceable rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* 67 71.

action than socio-economic rights.[8] Expressed in terms of a sliding scale reflecting positive and negative dimensions, one would conclude that both categories of rights fit on this scale. The difference, however, is that socio-economic rights slide more towards the positive dimension side of the scale. At the very least one could conclude that the majority of cases contesting these rights touch on their positive aspects. In contrast, civil and political rights slide more towards the negative side.[9]

It should be noted that courts are more comfortable enjoining states by prohibiting certain conduct than by requiring that positive action be taken.[10] Enforcing negative obligations is believed to result in less interference in the spheres of the other organs of state,[11] and the questions raised when enforcing negative obligations are not as complicated as those raised in the case of positive obligations. The budgetary implications of enforcing positive obligations are, for instance, far more severe than those of enforcing negative obligations.[12] This explains why the courts have readily used prohibitive remedies, such as the prohibitory injunction, and been reluctant to use such positive remedies as the mandatory or structural injunctions.

However, in some contexts the enforcement of negative obligations in socio-economic rights terms may be as complicated as enforcing positive obligations. It is also true that enforcing negative obligations may require substantial resources. A prohibitory injunction, for instance, proscribing an eviction without alternative accommodation, may require government to spend money on providing alternative accommodation. This is in addition to paying compensation for the continued use of private land from which an eviction cannot occur without alternative accommodation.[13] Another example relates to the enforcement of the section 9 negative right not to be unfairly discriminated against. In some cases a finding that

8 See V Abramovich 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 181 183.

9 See M Sepúlveda The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights (2003) 125; see also Abramovich (n 8 above) 186-187.

10 J Berryman *The law of equitable remedies* (2000) 40. See also K Cooper-Stephenson 'Principle and pragmatism in the law of remedies' in J Berryman *Remedies, issues and perspectives* (1991) 35; and D Horowitz *The courts and social policy* (1977) 19.

11 D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 26.

12 P Lenta 'Judicial restraint and overreach' (2004) 20 *South Africa Journal on Human Rights* 544 567. See also M Wells & T Eaton *Constitutional remedies: A reference book for the United States Constitution* (2002) xxv.

13 See *Modder East Squatters v Modderklip Boerdery v President of Republic of South Africa v Modderklip Boerdery* 2004 8 BCLR 821 (SCA); and *Modderklip Boerdery (Pty) Ltd and Others v President of RSA and Another* 2005 8 BCLR 786 (CC).

the applicants have been unfairly excluded from socio-economic benefits must be followed by provision of such benefits to them. This may require an enhancement of the resources committed to the programme under which the benefits are provided.[14]

Nonetheless, it cannot be denied that in enforcing negative obligations the budgetary consequences are more occasional than when enforcing positive obligations. It is this that has makes litigation-invoking positive obligations more controversial when compared to enforcement of negative obligations. Enforcing positive obligations is also perceived as giving the courts leeway to interfere with functions reserved for the executive and legislative branches of state, as discussed below.[15]

Socio-economic rights also continue to be perceived as vague and devoid of any normative content.[16] In normative terms, socio-economic rights have not been as developed as civil and political rights. Socio-economic rights have been neglected and have not been the subject of as much judicial interpretation as civil and political rights. This has left the normative content of socio-economic rights relatively undeveloped. However, continued recognition of socio-economic rights as justiciable is likely to lead to increased clarification of the nature of the obligations they engender.[17] The rights have been recognised as justiciable not only at the international and regional levels, but also in several domestic jurisdictions.[18] It is important, however, that courts involved in socio-economic rights litigation should not be complacent but should rather strive to develop the normative content of these rights.

In developing the normative content of the rights courts should use international jurisprudence, particularly the General Comments of the ESCR Committee, as the starting point. The duties on the state to respect, protect, promote and fulfil the rights provide a viable mechanism for the clarification of the obligations engendered by the rights. Yet this mechanism applies to both civil and political rights and socio-economic rights and blurs the distinction between them.

14 See *Khosa and Others v Minister of Social Development; Mahlaule and Another v Minister of Social Development and Others* 2004 6 BCLR 596 (CC) (*Khosa* case).

15 Sec 7.3.

16 See C Munoz 'Stand up for your rights' *The Economist* 22 March 2007. See also A Neier 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* 1.

17 See P Alston 'No right to complain about being poor: The need for an optional protocol to the economic rights covenant' in A Eide & J Helgesen (eds) *The future of human rights protection in a changing world: Fifty years since the four freedoms address: Essays in honour of Torkel Opsahl* (1991) 79.

18 See generally F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006).

Thus far, the Constitutional Court has not adequately developed the substantive content of the rights protected in the Constitution. The Court has not only rejected the notion of a minimum core, but has also failed to describe the components of the various socio-economic rights. Furthermore, the Court has failed to develop a proper approach to determining the effectiveness of the means chosen by the state to realise the rights. Some commentators have approved the Constitutional Court's rejection of the minimum core approach and its resort to the reasonableness review approach as the most appropriate to enforce socio-economic rights contextually.[19] What the Court and these commentators have failed to appreciate, however, is the fact that the minimum core approach is not necessarily inflexible. As a result, both the Constitutional Court and the commentators have closed down space for pragmatic approaches that could be used in defining the minimum core of the socio-economic rights in the Constitution.[20]

The flexibility of the notion of a minimum core is reflected in the manner in which it has been constructed by the ESCR Committee. The Committee has recognised the fact that in some situations it may not be possible to provide everyone with a minimum level of goods and services. The Committee is of the view that a state can justify its failure to provide a minimum core, for instance, on the ground of inadequate resources: 'Any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.'[21]

A very important qualification of this, however, is the requirement that the state 'demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.[22] This is

19 See S Liebenberg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in J Squires *et al* (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 73; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1 24; M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* 473 491; and C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South Africa Law Journal* 264 273-274 275.

20 For examples of how the minimum core can be defined pragmatically, see D Bilchitz 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* 2.

21 ESCR Committee General Comment 3, *The nature of state parties' obligations* (5th session, 1990), UN Doc E/1991/23, annex III 86 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 14 (2003) para 10.

22 As above. The ESCR Committee has also said that, even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances (para 11).

important because, unlike the reasonableness review approach, it casts the burden on the state to prove that it is doing whatever is reasonable to ensure maximum enjoyment of the rights. Nonetheless, the government need not prove that a minimum core is being provided; rather it has to show that a reasonable level of goods and services is being provided as is permitted by the available resources. This, however, does not mean that the court is absolved from any form of responsibility. It has to interrogate the state in order to determine whether the available resources have been applied appropriately. This is something which the Constitutional Court has ignored in its reasonableness review approach; under the Court's approach, the burden to prove unreasonableness is cast on the applicant who may not be in possession of adequate government information necessary for this purpose.

The Constitutional Court has also not developed a clear practice of interrogating the reasonableness of budgetary allocations. The Court has been circumspect in scrutinising budgetary allocations made by the executive and legislative branches of the state.[23] It has chosen, in some cases, to completely defer to the executive and legislative organs of state on issues of budgetary allocations. It should be noted, however, that there is hope as there is evidence that the Court is moving in the direction of requiring the government to justify its budgetary allocations as reasonable. The *Khosa* case[24] is evidence of this. However, this case could be distinguished from other cases because it dealt with exclusion from a service, and therefore invoked a negative duty. This notwithstanding, the principles it enunciates as regards the burden on the state to justify its budgetary allocations could be extended to cases dealing with purely positive obligations. The Constitutional Court's emphasis in this judgment, that it is the responsibility of the government to put all evidence relating to the resource implications of a case before the Court, cannot be overlooked. Indeed, rather than hurriedly reject the minimum core, this approach could have been used by the Constitutional Court to require the government to adduce evidence that it cannot afford a minimum core. Even where there is evidence that the resources are inadequate, it would have to be demonstrated that government is working towards achieving a minimum core as soon as resources become available.

23 D Brand 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 207 223.

24 For a detailed discussion of this case, see ch three sec 3.2.5. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) para 88.

The reasonableness review approach is also inadequate, to the extent that it does not interrogate the means chosen by the state to determine whether they are capable of realising the rights. It is indeed doubtful whether the reasonableness review approach can be described as 'a means-end test', as has been suggested by some authors.[25] The approach does not require a court to question whether state action is rationally connected to the purpose for which it was taken. The government is not required to demonstrate that its programme, policy or legislation is capable of realising the targeted right(s). It is because of this shortcoming that I have suggested the use of a rational connection test similar in some respects to the one used in the section 36 general limitations inquiry. The burden would be cast on the government to prove not only that the intended measures would realise the rights, but also that they are the least restrictive. Measures not reasonably capable of realising the rights, or which are not the least restrictive, would be condemned by the court. To avoid separation of powers-based criticisms, however, the court would not immediately substitute its own measures for the government's condemned measures. Instead, the court would defer to the government on the most appropriate means, while giving guidance on the basic contents of any selected measures.

The need to prove a rational connection between the measures and the rights is also important, because it would force the courts to give content to the rights. This is because the rights represent the goal to be attained; unless the goal (which is the realisation of the right) is defined with precision, it may not be possible to assess the means selected for this.

7.2 Overcoming separation of powers-based objections

Other than the normative nature of the rights, as discussed above, the Constitutional Court's approach in adjudicating socio-economic rights could be explained by the need to maintain the doctrine of separation of powers. The Court has avoided constructions that would lead to confrontation with other organs of state. This includes constructions that would, for instance, impose what may be perceived by the government to be unreasonable resource burdens.

The objection to the judicial enforcement of socio-economic rights on the basis of the separation of powers has assumed two dimensions. First, it is contended that socio-economic rights litigation

[25] See Brand (n 23 above) 221. See also D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003) 33-56.

allows an undemocratic judiciary to make judgments on matters that require democratic deliberation. Secondly, the judiciary is institutionally deficient, and is not able to deal with some of the issues to which the enforcement of socio-economic rights gives rise. This includes issues such as making budgetary and policy choices. It has also been contended that the courts are ill-suited to adjudicate socio-economic rights because litigation of these rights is polycentric.

While the Constitutional Court has rejected the separation of powers doctrine as a reason for keeping courts away from socio-economic rights, it has not escaped from the influence of this doctrine. The need on the part of the Court to uphold the doctrine of separation of powers is reflected in the way it has construed the obligations engendered by socio-economic rights. The Constitutional Court has been very careful not to construe the rights in ways that would result in courts assuming what appear to be legislative or executive functions.[26] The courts have respected the fact that functions such as making budgetary and policy related choices are reserved for the legislative and executive organs of state: '[A court may] disagree with the allocation of resources … and one may justifiably debate priorities but … [the CC] has not sanctioned the reallocation of public funds by courts.'[27] The doctrine of separation of powers and awareness of the courts' institutional limitations has also influenced the approach of the courts in dealing with remedies for violation of socio-economic rights. The courts have been very careful not to grant remedies that their institutional capacity does not allow them to grant or enforce. This partly explains why the Constitutional Court has been very reluctant to use the structural interdict as a readily available remedy.

The separation of powers concerns cannot be dismissed simply on the basis that the courts are mandated by the principles of checks and balances and the doctrine of constitutionalism to enforce the rights. There is no doubt that the judiciary may have some features that make it qualified to adjudicate socio-economic rights. This notwithstanding, the judiciary is also constrained in a number of respects. The courts are technically handicapped and may have to rely on the judgment of other organs of state.[28] This is especially so in dealing with, for instance, budgetary issues or policy questions that need technical skills or democratic deliberation. Budgetary considerations may give rise to questions that are hard for the judiciary to answer because some of them may relate to priority

26 See *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) para 181.

27 *The City of Johannesburg v Rand Properties (Pty) Ltd and Others* Case 253/06 (Supreme Court of Appeal) (unreported) para 45.

28 See Steinberg (n 19 above) 270.

setting. The courts may have to defer these questions to the executive and legislative organs of state. This, though, does not mean that judicial deference should be adopted as a general rule. It is something that the court ought to have in mind and apply on a case-by-case basis depending on the demands of every case. In essence, the issue relates to the necessity of maintaining a fine balance between, on the one hand, the need to protect rights and, on the other hand, the danger of too great an interference in the affairs of the executive and legislative branches of government.[29] The question then becomes one of determining the stage at which judicial intervention would be justified.

There is no doubt that some functions are preserved for the executive and legislative branches of government. However, when these branches ignore their constitutional obligations, the judiciary is empowered to step in and enforce them. This interference is mandated by the Constitution. Most importantly, however, the extent of what may appear to be interference should be determined by the degree of failure or neglect on the part of the executive and legislative organs to discharge their constitutional obligations. In remedial terms, the level of intrusiveness in response to failure or neglect should be determined by the level of recalcitrance exhibited by the government. Where there is evidence that the government will not respect the court order, the court is justified to issue highly intrusive remedies such as mandatory or structural interdicts. This, though, should come as a last resort after all efforts have been exhausted to secure the co-operation of government in implementing the court orders. The courts should, for instance, acknowledge and make use of the expertise at the disposal of the executive and legislative organs of state before displacing these organs. This notwithstanding, there could be cases in which intervention as a matter of first resort is justified. This could be in those cases where there is no chance of procuring co-operation, or where the seriousness of the matter at stake demands immediate intervention.

It should also be noted that it is not prudent for the courts to overlook the fact that socio-economic rights litigation is essentially polycentric. The courts may not be able to appreciate and attend to all the polycentric interests implicated by a case. However, the courts should strive as much as possible to appreciate and attend to these interests. It is for this reason that I have suggested that, when using the structural interdict, courts should try, as much as possible, to secure the participation of persons who may be affected by the outcome of a case. The courts should also ensure that the remedies

[29] M Corbett 'Human rights: The road ahead' in C Forsyth & J Schiller (eds) *Human rights: The Cape Town conference* (1979) 6.

they grant bring benefits to a wide section of people in need of such benefits and not just to the litigants in court. It is only possible for a court to do this if it inclines more towards the notion of distributive justice and less towards the notion of corrective justice, as discussed below.

7.3 Appropriate, just and equitable remedies: Role of form of justice

The notions of corrective and distributive justice provide an important theoretical framework that could be used to assess the kinds of remedies granted by the courts. The remedies that are granted by a court inclined towards the notion of corrective justice will differ from those granted by a court inclined towards distributive justice. However, the appropriateness of each of these remedies will depend on the perspective from which one assesses them. To those who view socio-economic rights, for instance, as establishing individual entitlements, corrective justice-based remedies will be the most appropriate. In contrast, those who view these rights as establishing collective entitlements will consider distributive justice-based remedies as the most appropriate. The question that ought to be answered before one examines the remedies granted in respect of socio-economic rights, however, is whether it is ideal to enforce these rights, either as individual or collective rights.

I have demonstrated in this book that socio-economic rights cannot be enforced outside the social and economic context in which they are protected.[30] The majority of South Africans are poor and in dire need of socio-economic goods and services, but, as observed in chapter two,[31] these goods and services require a great deal of resources to realise. Yet the state may not have all the resources required to provide every individual with the goods and services he or she needs even at a very basic level. This is something that the Constitution acknowledges by requiring the progressive realisation of socio-economic rights within the available resources.[32] In this context, it is only reasonable that the rights be enforced as collective rather than as individual ones, because this is what the socio-economic context dictates. The realisation of collective rights requires careful redistribution of resources in order to benefit all in need of them. Redistribution of this nature is most appropriately

30 See ch five sec 5.2. See also P de Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258 262.
31 Sec 2.3.1.1.
32 Secs 26(2) & 27(1).

realised through litigation that is guided by the ethos of distributive justice.

It is on the basis of the above that the appropriateness of remedies for socio-economic rights violations should be assessed. The success or failure of a remedy should not be assessed solely on the basis of its impact on the litigants such as the Grootboom community. This is so because it is important that in dealing with socio-economic claims the courts should consider the interests of persons other than the litigant(s). It is also important for the courts to appreciate the fact that providing for the socio-economic needs of an individual or groups of individuals may have repercussions for similarly situated persons.[33] The remedies that the courts grant therefore should be aimed at maximising the socio-economic benefits implicated by the case for the benefit of all similarly situated persons. In this context, it may be impossible to put the victims of a violation in the position they would have been in but for the violation as demanded by those who support corrective justice.

The *Grootboom* case has been used by many commentators to demonstrate the weaknesses of the remedies granted by the Constitutional Court in socio-economic rights litigation.[34] It has been argued that the situation of the Grootboom community has not changed dramatically even with judgment in their favour. However, this case could also be used to demonstrate the distributive benefits that socio-economic rights litigation can bring about. The case has set standards to be used to assess the reasonableness of government conduct, and has resulted in programmes and policies that advance the socio-economic rights of all in need as presented by the context. Although the case has not resulted in a dramatic improvement of the conditions of the Grootboom community, it has resulted in benefits for a wide range of poor and vulnerable people.

Nonetheless, the fact that the socio-economic context dictates that socio-economic rights can only be realised as collective rights should not be interpreted to mean that the rights cannot result in individual entitlements. The ultimate outcome of any programme for the realisation of these rights should aim at maximisation of individual wellbeing, if not in the short run at least in the long run. The socio-economic context as characterised, amongst others, by inadequacy of resources should not be viewed as a permanent and unalterable state

33 See Sachs (n 6 above) 144.

34 See M Swart 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 215; K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* 225; and D Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301.

of affairs. As seen in chapter three,[35] it is incumbent upon the government to put in place measures that enable it to enhance the level of resources at its disposal. This means that the rights may be enforced as individual entitlements as soon as resources needed for this purpose become available. Ancillary to this is the fact that, while the non-provision of a minimum core may be justified in the present context on the basis of limited resources, this does not mean that the concept be discarded completely. It should be incumbent upon the government to provide everyone with a minimum level of goods and services as soon as resources for this purpose become available.

7.4 Concluding remarks

While much has been written on the subject of the judicial enforcement of socio-economic rights in South Africa, no research has focused on a comprehensive examination of the subject of remedies as this study has done. This study has engaged the description and analysis of the factors that courts consider, or should consider, when deciding to grant certain remedies. This analysis is intended to give a proper foundation for any critique of the appropriateness of judicial remedies in constitutional litigation generally and socio-economic rights litigation in particular. It is contended that, while socio-economic rights are as justiciable as civil and political rights, they have characteristics that make their enforcement much more controversial. Generally, they require far more affirmative action and resources, and the remedies resulting from a violation of these rights are distributive in nature. It is upon this basis that the theoretical foundations of judicial remedies have been discussed.

Great emphasis has been laid on the effect of the form of justice that the courts choose to pursue. The study has shown that the nature and objectives of remedies arising from corrective justice are quite different from those that arise from distributive justice. It has been demonstrated that any critique of judicial remedies without an understanding of the form of justice that one considers ideal is a parochial and arid exercise. It is on this basis that the appropriateness of the different remedies available in constitutional litigation, such as declarations, damages and injunctions, has been analysed.

This book has also been able to examine in detail the most controversial of the remedies, the structural interdict. As a result thereof, the study has formulated guiding norms and principles that may be used by the courts when considering this form of relief. These norms and principles should not only guide the courts in deciding whether the structural interdict is appropriate, but also indicate its

[35] Sec 3.2.4.

use in a particular case. It should be used as of necessity, and, when used, it should be flexible and graduated. This is in addition to ensuring the widest participation of all stakeholders, ensuring reasoned decision making, developing the substantive norms, and maintaining independence and impartiality.

TABLE OF STATUTES

Canada

Constitution of Canada, Constitution Act 1982

South Africa

Abolition of Civil Imprisonment Act 2 of 1977

Constitution of the Republic of South Africa, 1996

Interim Constitution of the Republic of South Africa Act 200 of 1993

National Housing Act 107 of 1997

Promotion of Administrative Justice Act 3 of 2000

Republic of South Africa Constitution Act 110 of 1983

Rules of the Constitutional Court, promulgated under Government Notice R1675 in Government Gazette 25726 of 31 October 2003, rule 8(1)

Social Assistance Act 59 of 1992

South African Union Act 31 May 1910

South African Republic Constitution Act 32 of 1961

State Liability Act 20 of 1957

Supreme Courts Act 59 of 1959

TABLE OF CASES

African Commission on Human and Peoples' Rights

Social and Economic Rights Action Center (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Purohit and Moore v The Gambia Communication No 24/2001, *Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2002-2003* at 62

Rakesh Chantl v State of Bihar [1986] (Supp) SCC 576

Canada

Doucet-Boudreau v Nova Scotia [2003] 3 SCR 3

Eldridge and Others v British Columbia and Others (Attorney-General) [1997] 3 SCR 624, 151 DLR (4th) 577

Gould v Attorney-General of Canada [1984] 2 SCR 124

Howard v Stony Mountain [1984] 2 FC 642 (CA)

Hunter et al v Southam Inc (1985) 11 DLR (4th) 641

Lavoie v Nova Scotia (Attorney-General) 47 DLR (4th) 586; 1988 DLR Lexis 1108

Mahe v Alberta (1985) 22 DLR (4th) 24, 39 Alta LR (2d) 215 (QB)

Marchand v Simcoe (1986) 55 OR (2d) 638

McKinney v University of Guelph (1990), 76 DLR (4th) 545, [1990] 3 SCR 229

Operation Dismantle Inc. v Canada [1985] 1 SCR 441

R v Big M Drug Mart Ltd 1985 18 DLR (4th) 321 [Canada]

R v Oakes [1986] 1 SCR 103, 26 DLR (4th) 200 [Canada]

Saskatchewan Human Rights Commission v Kodellas (1989) 60 DLR (4th)

Société des Acadiens v Association of Parents [1986] 1 SCR 549; (1984), 8 DLR (4th) 238; (1983), 48 NBR (2d) 361

Vorvis v ICBC (1989) 58 DLR (4th) 193 (SCC)

India

Metha v Union of India (1989) 2 SCC 179

Paschim Banga Khet Mazdoor Samity v State of West Bengal [1996] ICHRL 31 (6 May 1996) [Supreme Court of India]

People's Union for Democratic Rights and Others v Union of India and Others (1982) 3 SCC 235

Vellore Citizens Welfare Forum v Union of India WP 914/1991, available at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep3237.html (accessed on 12 September 2006)

Namibia

Ex parte Attorney General, Namibia: In Re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC)

Philippines

Juan Antonio Oposa and Others v the Honourable Fulgencio S Factoran and Another 33 ILM (1994) 174

Sri Lanka

Deshapriya and Another v Municipal Council, Nuwara Elye and Others [1996] 1 CHRD 115, accessed online from the University of Minnesota Human Rights Library, at <http://www1.umn.edu/humanrts/research/srilanka/caselaw/Speech/Deshapriya _v_Municipal_Council_Nuwara_Eliya.htm> (accessed on 3 August 2006)

South Africa

August and Another v the Electoral Commission and Others 1999 3 SA 1 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 7 BCLR 687 (CC)

Bankorp Trust Bpk v Pienaar 1993 4 SA 215 (N)

Brink v Kitshoff NO 1996 2 SA 197 (CC)

Brown v Leyds NO (1897) 4 Off Rep 112

Burman and Others v Davis (1920) 41 NPD 273

Bushbuck Ridge Border Committee and Another v Government of the Northern Province and Others 1999 2 BCLR 193 (T)

Cabinet for the Territory of South West Africa v Chikane and Another 1989 1 SA 349 (A)

Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 3 SA 369 (A)

Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC)

Centre for Child Law and Others v MEC for Education and Others Case No 19559/06 [Unreported]

Christian Education South Africa v Minister of Education 2000 4 SA 757 (CC)

Candid Electronics (Pty) Ltd v Merchandise Buying Syndicate (Pty) Ltd 1992 2 SA 459 (C)

United Kingdom

United States of America

TABLE OF INTERNATIONAL TREATIES AND DOCUMENTS

Committee on Economic, Social and Cultural Rights, General Comment 12, *The right to adequate food* [article 11] (Twentieth session, 1999), UN Doc E/C.12/1998/5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 54 (2003)

Committee on Economic, Social and Cultural Rights, General Comment 14, *The right to the highest attainable standard of health* (Twenty-second session, 2000), UN Doc E/C.12/2000/4 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 85 (2003)

Committee on Economic, Social and Cultural Rights, General Comment 15, *The right to water* (Twenty-ninth session, 2003), UN Doc E/C.12/2002/11 (2002), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 105 (2003)

Concluding Observations adopted by the Committee on Economic, Social and Cultural Rights at its 57th meeting (nineteenth session) held on 4 December 1998

Inter-American Commission on Human Rights Annual Report, 1993 OEA/Ser.L/V.85, Feb 1994

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by a group of experts at Maastricht, 22 – 26 January 1997, text in Ramcharan, B (ed) *Judicial protection of economic, social and cultural rights* (2005) Martinus Nijhoff Publishers 553–562.

Note No 143/06 made by South Africa to the President of the United Nations General Assembly 2 May 2006 annexed to document detailing the list of candidates for election to the Human Rights Council, UN General Assembly 60th Session: *Election and Appointments. Subsidiary Organs and other elections*, available at <http://www.un.org/ga/60/elect/hrc/>

BIBLIOGRAPHY

Books

Ahmed An-Na'im, A (1992) 'Introduction' in A Ahmed An-Na'im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* University of Pennsylvania Press

Aldous, G & Alder, J (1993) *Application for judicial review: Law and practice of the Crown Office* Butterworths

Alston, P & Tomasevski, K (eds) (1984) *Right to Food* Martinus Nijhoff

Andreassen, B & Eide, A (eds) (1988) *Human rights in developing countries 1987/88: A Yearbook on human rights in countries receiving Nordic aid* Chr Michelsen Institute, Danish Center for Human Rights and Norwegian Institute of Human Rights

Andrews, P & Ellman, S (eds) (2001) *The post-apartheid constitutions: Perspectives on South Africa's basic law* Witwatersrand University Press and Ohio University Press – Athens, 405

Arambulo, K (1999) *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* INTERSENTIA

Aristotle, *Nicomachean ethics*, V, 2-5

Barnett, H (2004) *Constitutional and administrative law* Cavendish Publishing

Bas de Gaay, F & Goldewijk, BK (1998) *God and the goods: global economy in a civilisational perspective*' World Council of Churches Publications

Berger, R (1999) *Government by judiciary: The transformation of the Fourteenth Amendmen*t Cambridge University Press

Berryman, J (1991) *Remedies: Issues and perspectives* Thomas Professional Publishing

Berryman, J (2000) *The law of equitable remedies* Irwin Law

Bickel, A (1962) *The least dangerous branch: The Supreme Court at the bar of politics* Bobbs-Merill

Bilchitz, D (2007) *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* Oxford University Press

Borchand, E (1941) *Declaratory judgments* Banks-Baldwin Law Publishing Co

Bork, R (1990) *The tempting of America: The political seduction of Law* The Free Press

Botha, H; Van der Walt, A & Van der Walt, J (eds) (2003) *Rights and democracy in a transformative constitution* Sun Press Stellenbosch

Brand, D & Russell, S (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* Protea Book House

Brand, D & Heyns, C (eds) (2005) *Socio-economic rights in South Africa* Pretoria University Law Press

Brewer, AR (1989) *Judicial review in comparative law* Cambridge University Press

Buhlungu, S; Daniel, J; Southall, R & Lutchman, J (eds) (2005) *State of the Nation: South Africa 2005-2006* Human Sciences Research Council

Burrows, A (1994) *Remedies for torts and breaches of contract* Butterworths

Cachalia, A; Cheadle, H; Davis, D; Haysom, N; Maduna, P & Marcus, G (1994) *Fundamental rights in the new Constitution* Juta & Company and Centre for Applied Legal Studies

Chapman, A & Russell, S (eds) (2002) *The core obligations: Building a framework for economic, social and cultural rights* Intersentia Antwerp

Chaskalson, M; Kentridge, J; Klaaren, J; Marcus, G; Spitz, D & Woolman, S (eds) (1995) *Constitutional law of South Africa* Juta & Company

Coomans, F (ed) (2006) *Justiciability of economic and social rights: Experiences from domestic systems* INTERSENTIA

Corder, H (1984) *Judges at work: The role and attitudes of the South African Appellate Judiciary 1910 - 1950* Juta & Company

Cottrell, J & Ghai, Y (eds) (2004) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* INTERIGHTS

Cranston, M (1973) *What are human rights* Bodley Head

Craven, M (1995) *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* Oxford University Press

Currie, I & De Waal, J (2001) *The new constitutional and administrative law* Volume 1 Juta & Company

Currie, I & De Waal, J (2005) *The Bill of Rights handbook* Juta & Company

Davel, J (ed) (2000) *Introduction to child law in South Africa* Juta & Company

Davis, D; Halton, C & Haysom, N (1997) *Fundamental rights in the Constitution: Commentary and cases* Juta & Company

Devenish, G (1999) *A Commentary on the South African Bill of Rights* Butterworths Durban

De Villiers, B (ed) (1994) *Birth of a constitution* Juta & Company

De Visser, J & Mbazira, C (eds) (2006) *Water delivery: Public or private* Centre for Environmental Law and Policy

De Wet, E (1996) *The constitutional enforceability of economic and social rights: The meaning of the Germany constitutional model for South Africa* Butterworths Publishers

Dicey, AV (1982) *Introduction to the study of the law of the constitution* [1885], Liberty Fund

Dlamin, C (1995) *Human rights in Africa: Which way South Africa* Butterworths

Dugard, J (1978) *Human rights and the South African legal order* Princeton University Press

Dworkin, R (1993) *Life's dominion* Harper Collins

Eide, A; Krause, C & Rosas, A (eds) (2001) *Economic, social and cultural rights: A textbook* Kluwer Law International

Eide, A (ed) (1984) *Food as a human right* United Nations University

Ely, J (1980) *Democracy and distrus*t Harvard University Press

Ewing, K & Gearty, C (1991) *Democracy or a bill of rights*

Fiss, O (1978) *The civil rights injunction* Indiana University Press

Fox, W (1986) *Understanding administrative law* Mathews Bender & Company

Freeman, S (ed) (2003) *The Cambridge companion to Rawls* Cambridge University Press

Glennon, MJ (1992) *A constitutional law anthology* Anderson Publishing Company

Goodin, E & Pettit, P (eds) (1995) *A companion to contemporary political philosophy* Blackwell Publishing Ltd

Halpern, C & Lamb, C (eds) (1982) *Supreme Court activism and restraint* D.C. Heath and Company

Hassen, E (1998) *The soul of a nation: Constitution-making in South Africa* Oxford University Press

Hirschl, R (2004) *Towards juristocracy: The origins and consequences of the new constitutionalism* Harvard University Press

Hoexter, C & Lyster, R (2002) *The new constitutional and administrative law* Vol. 2. Juta Law

Holmström, L (ed) (2003) *Concluding observations of the UN Committee on Economic, Social and Cultural Rights: Eighth to Twenty-seventh sessions (1993-2000)* Martinus Nijhoff Publishers

Horowitz, D (1977) *The courts and social policy* The Brookings Institution

Jones, T & Buckle, H (1988-1991) *The civil practice of the magistrates' courts in South Africa vol. I* Juta & Co

Joubert, W & Faris, J (eds) (1998) *The law of South Africa* Butterworths

Karin, A & Mihyo, P (eds) (2003) *Responding to the human rights deficit, essays in hounour of Bas de Gaay Fortman* Kluwer Law International

Kercher, B & Noone, M (1990) *Remedies* The Law Book Company Limited

Klug, H (2000) *Constituting democracy: Law, globalism, and South Africa's political reconstruction* Cambridge University Press

Lawson, F (1972) *Remedies of English law* Butterworth & Co

Lewis, C (1992) *Judicial remedies in public law* Sweet & Maxwell

Locke, J (1690) *The second treatise of civil government* (1690)

Locke, J (1967) Two treaties of civil government

Macpherson, B (1967) *The political theory of possessive individualism: Hobbes to Locke* Oxford University Press

Mahoney, E & Mahoney, P (eds) (1993) *Human Rights in the twentieth century* Martinus Nijhoff

Malloy, P (1990) *Law and economics: A comparative approach to theory and practice* West/Thomson/Foundation Press

Mbazira, C (2006) *Realising socio-economic rights in the South African Constitution: The obligations of local government, a guide for municipalities* Community Law Centre, University of the Western Cape

Mbazira, C (2008) *You are the "weakest link" in realising socio-economic rights: Goodbye. Strategies for effective implementation of court orders in South Africa* (2008) Socio-Economic Rights Project, Community Law Centre Research Series 3

McGregor, H (1961) *Mayne and McGregor on damages* The Common Law Library No. 9 Sweet & Maxwell Limited

Montesquieu (1955) *L'Espirit des Loix*

Motala, Z & Ramaphosa, C (2002) *Constitutional law: Analysis and cases* Oxford University Press

Mulhall, S & Swift, A (1996) *Liberals and communitarians* Blackwell Publishers Ltd

Nowak, M (2003) *Introduction to the international human rights regime* Brill Academic Publishers

Paterson, T (2001) *Eckard's principles of civil procedure in the magistrates' courts* Juta Law

Peris, J & Kristian, S (eds) (2005) *Democratising development: The politics of socio-economic rights in South Africa* Martinus Nijhoff Publishers

Plattner, M (ed) (1984) *Human rights in our time: Essays in memory of Victor Baras* West View Press

Pomeroy, J (1876) *Remedies and rights by civil action* Little, Brown and Co

Pound, R (1939) *The formative era of American law* Little, Brown and Company

Prest, B (1996) *The law and practice of interdicts* (1996) Juta & Co

Rawls, J (1993) *Political liberalism* Columbia University Press

Rawls, J (1999) *A theory of justice* Oxford University Press

Roach, K (1994) *Constitutional remedies in Canada* Law Book Inc

Roland, J & Chapman, J (eds) (1979) *Constitutionalism: Nomos XX* New York University Press

Rossiter, C (ed) (1961) *The Federalist Paper* Penguin Books

Russel, P & O'Brien, M (2001) *Judicial independence in the age of democracy: Critical perspectives from around the world* University Press of Virginia

Sachs, A (1990) *Protecting human rights in a new South Africa* Oxford University Press

Sandel, M (1998) *Liberalism and the limits of justice* Cambridge University Press

Scanlon, M (2000) *What we owe each other* Harvard University Press

Schuck, P (1983) *Suing government: Citizen remedies for official wrongs* Yale University Press

Sepúlveda, M (2003) *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* INTERSENTIA

Shelton, D (1999) *Remedies in international human rights law* Oxford University Press

Shue, S (1980) *Basic rights: subsistence, affluence, and US foreign policy* Princeton University Press

Simon, L (ed) (2002) *The Blackwell guide to social and political philosophy* Blackwell Publishers Ltd

Smith, A (2002) *The Russian Revolution: A very short introduction* Oxford University Press

Steiner, H & Alston, P (2000) *International human rights in context: Law, politics, morals* Oxford University Press

Steytler, N (ed) (1991) *The Freedom Charter and beyond: Founding the principles for a democratic South African legal order* Community Law Centre, University of the Western Cape

Sunstein, C (2001) *Designing democracy: What constitutions do* Oxford University Press

Sunstein, C (1999) *One case at a time: Judicial minimalism on the Supreme Court* President and Fellows of Harvard College

Squires, J; Langford, M & Thiele, B (2005) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* Australian Human Rights Centre and Centre on Housing Rights and Evictions

Treitel, G (1989) *Remedies for breach of contract: A comparative account* Oxford University Press

Van der Walt, A (2002) *Law of property casebook for students* Juta & Co

Van der Westhuizen, J & Viljoen, H (eds) (1988) *A bill of rights for South Africa* Butterworths

Van Wyk, D; Dugard, D; De Villiers, J & Davis, D (eds) (1994) *Rights and constitutionalism: The new South African legal order* Juta & Company

Vile, M (1998) *Constitutionalism and separation of powers* [1967], Liberty Fund

Walker, D (1974) *The law of civil remedies in Scotland* Green & Sons

Wells, M & Eaton, T (2002) *Constitutional remedies: A reference book for the United States Constitution* Praeger Publishing

Zakrzewski, R (2005) *Remedies reclassified* Oxford University Press

Chapters in books

Alston, P 'No right to complain about being poor: The need for an optional protocol to the economic rights Covenant in Eide, A & Helgesen, J (eds) (1991) *The future of human rights protection in a changing world: Fifty years since the four freedoms address: Essays in honour of Torkel Opsahl* Norwegian University Press 79

Andreassen, B; Skålnes, T; Smith, G & Stokke, H 'Assessing human rights performance in developing countries: The case for a minimum threshold approach to economic and social rights' in Andreassen, B and Eide. A (eds) (1988) *Human rights in developing countries 1987/88: A yearbook on human rights in countries receiving Nordic aid* Chr Michelsen Institute, Danish Center for Human Rights and Norwegian Institute of Human Rights 333

Bekink, B & Brand, D 'Children's constitutional rights' in Davel, J (ed) (2000) *Introduction to child law in South Africa* Juta & Company 169

Bilchitz, D 'Health' in Woolman, S; Roux, T; Klaaren, J; Stein, A & Chaskalson, M (eds) (1996) *Constitutional law of South Africa* Juta & Company and Centre for Human Rights, University of Pretoria [2nd Edition, Original Service 2005] 56A-i

Bogart WA '"And the courts which govern their lives": The judges and legitimacy' in Berryman, J (1991) *Remedies: Issues and perspective* Thomas Professional Publishing Canada 49

Bossuyt, M 'International human rights systems: Strengths and weaknesses' in Mahoney, KE and Mahoney, P (eds) (1993) *Human rights in the twentieth century* Martinus Nijhoff 47

Brand, D 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in Coomans, F (ed) (2006) *Justiciability of economic and social rights: Experiences from domestic systems* INTERSENTIA 207

Brand, D 'Introduction to socio-economic rights in the South African Constitution' in Brand, D & Heyns, C (eds) (2005) *Socio-economic rights in South Africa* Pretoria University Law Press 1

Brand, D 'The proceduralisation of South African socio-economic rights jurisprudence, or "what are socio-economic rights for"' in Botha, H Van der Walt, A and Van der Walt, J (eds) (2003) *Rights and democracy in a transformative constitution* Sun Press Stellenbosch 33

Budlender, G 'Justiciability of socio-economic rights: Some South African experiences' in Ghai, Y & Cottrell, J (eds) (2004) *Economic, social and cultural rights* Interights 33

Cassels, J 'An inconvenient balance: The injunction as a Charter remedy' in Berryman, J (ed) (1991) *Remedies, issues and perspectives* Thomas Professional Publishing 272

Chapman, A & Russell, S 'Introduction' in Chapman, A & Russell, S (eds) (2002) *The core obligations: Building a framework for economic, social and cultural rights* INTERSENTIA 1

Coomans, F 'In search of the content of the right to education' in Chapman, A & Russell, S (eds) (2002) *The core obligations: Building a framework for economic, social and cultural rights* INTERSENTIA 217

Cooper-Stephenson, K 'Principle and pragmatism in the law of remedies' in Berryman, J (ed) (1991) *Remedies, issues and perspectives* Thomson Professional Publishing 1

Corbett, M 'Human rights: The road ahead' in Forsyth, C & Schiller, J (eds) (1979) *Human rights: The Cape Town conference* Juta & Company 1

Corder, H 'Seeking social justice: Judicial independence and responsiveness in a changing South Africa' in Russel, P & O'Brien, M (2001) *Judicial indepenedence in the age of democracy: Critical perspectives from around the world* University Press of Virginia 194

Cottrell, J & Ghai, Y 'The role of the courts in the protection of economic, social and cultural rights' in Cottrell, J & Ghai, Y (eds) (2004) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* INTERIGHTS 58

Cranston, M 'Human rights real and supposed' in Raphael D (ed) (1967) *Political theory and rights of man* Macmillan

Craven, M 'The International Covenant on Economic, Social and Cultural Rights' in Hanski, R & Suksi, M (eds) (1997) *An introduction to the international protection of human rights: A textbook* Institute of Human Rights , Åbo Akademi University 101

Currie, I 'The Constitutional Court's jurisdictional jurisprudence' in *The Constitutional Court of South Africa: First ten years* (2004) South African Constitutional Court

Davis, D; Chaskalson, M & De Waal, J 'Democracy and constitutional interpretation' in Van Wyk, D; Dugard, J; De Villiers, B & Davis, D (eds.) (1994) *Rights and constitutionalism: The new South African legal order* Juta & Company

De Villiers, B 'Social and economic rights' in Van Wyk, D; Dugard, J; De Villiers B & Davis D (eds) (1995) *Rights and constitutionalism: The new South African legal order* Juta & Company 599

De Villiers, B 'The constitutional principles: Content and significance' in De Villiers, B (ed) (1994) *Birth of a constitution* Juta Law 37

Didcott, M 'Practical workings of a bill of rights' in Van der Westhuizen, J & Viljoen H (eds) (1988) *A bill of rights for South Africa* Butterworths

Eide, A 'Economic, social and cultural rights as human rights' in Eide, A Krause, C & Rosas, A (eds) (2001) *Economic, social and cultural rights: A textbook* Kluwer Law International

Eide, A 'Universalisation of human rights versus globalisation of economic power' in Coomans, F; Westendorp, I & Willems, J (eds) (2000)

Rendering justice to the vulnerable: Liber amicorum in honour of Theo van Boven Kluwer Law International 99

Fairley, S 'Private law remedial principles and the Charter: Can the old dog wag the new tail' in Berryman, J (ed) (1991) *Remedies, issues and perspectives* Thomson Professional Publishing 313

Govender, K 'Assessing the constitutional protection of human rights in South Africa during the first decade of democracy' in Buhlungu, S; Daniel, J; Southall, R & Lutchman, J (eds) (2005) *State of the nation: South Africa 2005-2006* Human Sciences Research Council 93

Gutmann, A 'The rule of rights or the right to rule?' in Pennock, J & Chapman, W (eds) (1986) *Justification: Nomos XXVIII* New York University Press 15

Harms, L 'Interdicts' in Joubert, W & Faris, J (eds) (1998) *The law of South Africa* Butterworths 285

Heywood, M 'Shaping, making and breaking the law in the campaign for a National HIV/AIDS Plan' in Peris, J & Kristian, S (eds) (2005) *Democratising development: The politics of socio-economic rights in South Africa* Martinus Nijhoff Publishers 181

Jeffery, H 'The new politics of economic and social rights' in Karin, A & Mihyo, P (eds) (2003) *Responding to the human rights deficit. Essays in hounour of Bas de Gaay Fortman* Kluwer Law International 61

Kateb, G 'Remarks on the procedures of constitutional democracy' in Roland, J & Chapman, J (eds) (1979) *Constitutionalism: Nomos XX* New York University Press

Kentridge, J & Spitz, D 'Interpretation' in Chaskalson, M; Kentridge, J; Klaaren, J; Marcus, G; Spitz, D & Woolman, S (eds) (1996) *Constitutional law of South Africa* Juta & Company 11-i - 11-46 11-18

Krysztof, D 'The UN Charter and the Universal Declaration of Human Rights' in Hanski, R & Suksi, M (eds) (1997) *An introduction to the international protection of human rights: A textbook* Institute of Human Rights Åbo Akademi University 65

Kymlicka, W 'Community' in Goodin, E & Pettit, P (eds) (1995) *A companion to contemporary political philosophy* Blackwell Publishing Ltd 366

Liebenberg, S 'Enforcing positive socio-economic rights claims: The South African model of reasonableness' in Squires, J; Langford, M & Thiele, B (eds) (2005) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* Australian Human Rights Centre and Centre on Housing Rights and Eviction 73

Liebenberg, S 'The interpretation of socio-economic rights' in Woolman, S; Roux, T; Klaaren, J; Stein, A & Chaskalson, M (eds) (2005) *Constitutional law of South Africa* [2nd Edition, Original Service 12-03] Juta & Company and Centre for Human Rights, University of Pretoria 33–1

Liebenberg, S 'Violations of socio-economic rights: The role of the South African Human Rights Commission' in Andrews, P & Ellman, S (eds)

(2001) *The post-apartheid constitutions: Perspectives on South Africa's basic law* Witwatersrand University Press and Ohio University Press 405

Liebenberg, S 'Socio-economic rights' in Chaskalson, M; Kentridge, J; Klaaren, J; Marcus G, Spitz D & Woolman S (eds) (1996) *Constitutional law of South Africa* Juta & Company 41-1

Lester, L & O'Cinneide, C 'The effective protection of socio-economic rights' in Cottrell, J & Ghai, Y (eds) (2004) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* INTERIGHTS 17

Mandisa, M 'The Treatment Action Campaign and the history of rights-based, patient-driven HIV/AIDS activism in South Africa' in Peris, J & Kristian, S (eds) (2005) *Democratising development: The politics of socio-economic rights in South Africa* Martinus Nijhoff Publishers 213

Mbazira, C 'Privatisation and the right of access to sufficient water in South Africa: The case of Lukhanji and Amahlati' in De Visser, J & Mbazira, C (eds) (2006) *Water delivery: Public or private* Centre for Environmental Law and Policy 57

Opschoor, H 'Economic, social and cultural rights from an economist's perspective' in Karin, A & Mihyo, P (eds) (2003) *Responding to the human rights deficit, essays in hounour of Bas de Gaay Fortman* Kluwer Law International 73

Orwin, C & Pangle, T 'The philosophical foundation of human rights' in Plattner, F (ed) (1984) *Human rights in our time - Essays in memory of Victor Baras* Westview Press 1

Piechowiak, M 'What are human rights? The concept of human rights and their extra-legal justification' in Hanski, R & Suksi, M (eds) (1997) *An introduction to the international protection of human rights: A textbook* Institute of Human Rights, Åbo Akademi University 3

Raes, K 'The philosophical basis of economic, social and cultural rights' in Van der Auweraet, P; De Pelsmaeker, T; Sarkin, J & Vande Lanotte, J (eds) (2002) *Social, economic and cultural rights: An appraisal of current European and international developments* MAKLU 43

Roach, K 'Crafting remedies for violations of economic, social and cultural rights' in Squires, J; Langford, M & Thiele, B (eds) (2005) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* Australian Human Rights Centre and Centre on Housing Rights and Eviction 111

Russell, S 'Minimum state obligations: International dimensions' in Brand, D & Russell, S (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspective* Protea Book House 11

Ryan, A 'Liberalism' in Goodin, E & Pettit, P (eds) (1995) *A companion to contemporary political philosophy* Blackwell Publishing Ltd 291

Sachs, A 'The judicial enforcement of socio-economic rights: The *Grootboom* case' in Peris, J and Kristian, S (eds) (2005) *Democratising development: The politics of socio-economic rights in South Africa* Martinus Nijhoff Publishers 131

Scheffler, S 'Rawls and utilitarianism' in Freeman, S (ed.) (2003) *The Cambridge companion to Rawls* Cambridge University Press 426

Simon, L 'Social policy and political philosophy – Sorting out issues' in Simon L (ed) (2002) *The Blackwell guide to social and political philosophy* Blackwell Publishers 1

Van Bueren, G 'The minimum core obligations of states under article 10(3) of the International Covenant on Economic, Social and Cultural Rights' in Chapman, A & Russell, S (eds) (2002) *The core obligations: Building a framework for economic, social and cultural rights* INTERSENTIA 147

Wellman, C 'Justice' in Simon L (ed) (2002) *The Blackwell guide to social and political philosophy* Blackwell Publishers 60

Woolman, S 'Application' in Woolman, S; Roux, T; Klaaren, J; Stein, A & Chaskalson, M (eds) (2005) *Constitutional law of South Africa* Juta & Company and Centre for Human Rights, University of Pretoria 31-1

Woolman, S 'Limitation' in Chaskalson, M; Kentridge, J; Klaaren, J, Marcus, G; Spitz, D & Woolman, S (eds) (1996) *Constitutional law of South Africa* Juta & Company [Revised Service 2, 1998] 12-i

Articles in journals and periodicals

Abramovich, V 'Courses of action in economic, social and cultural rights: Instruments and allies' (2005) 2 *SUR – International Journal on Human Rights* 181

Allison, J 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *Cambridge Law Journal* 367

Alston, P & Quinn, G 'The nature and scope of states parties obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 8 *Human Rights Quarterly* 156

Baerhr, P 'Controversies in the current human rights debate' (2000) 2 *Human Rights Law Review* 7

Barber, N 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* 59

Berger, R 'Constitutional interpretation and activist fantasies' (1993) 82 *Kentucky Law Journal* 1

Bilchitz, D 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* 2

Bilchitz, D 'The right to health care services and the minimum core: Disentangling the principled and pragmatic strands' (2006) 7 *ESR Review* 2

Bilchitz, D 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 118 *South African Law Journal* 484

Bilchitz, D 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1

Bilchitz, D 'Placing basic needs at the centre of socio-economic rights jurisprudence' (2003) 4 *ESR Review* 2

Bossuyt, M 'La distinction juridique entre les droits civil et politiques et les droit economiques, sociaux et culturels' ('The legal distinction between civil and political rights and economic, social and cultural rights') (1975) 8 *Revue des Droits de l'Homme* (*Human Rights Journal*) 783

Brent, K; Marshall, J; Picou, J & Schlichtman, R 'Technological disasters, litigation stress and the use of alternative dispute resolution mechanisms' (2002) 26 *Law and Policy* 289

Bork, R 'Neutral principles and some First Amendment problems' (1971) 47 *Indiana Law Review* 1

Budlender, G 'Access to courts' (2004) 121 *South African Law Journal* 339

Budlender, G 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8 *ESR Review* 9–11

Cappelletti, M 'Judicial review of the constitutionality of state action: Its expansion and legitimacy' (1992) 2 *Journal of South African Law* 256

Capelletti, M 'The future of legal education: A comparative perspective' (1992) 8 *South African Journal on Human Rights* 1

Carr, L '*Wyatt v Stickney*: A landmark decision' (2004) *Alabama Disabilities Advocacy Newsletter*

Cassels, J 'Judicial activism and public interest litigation in India: Attempting the impossible' (1989) *American Journal of Comparative Law* 495

Chapman, A 'A new approach to monitoring the International Covenant on Economic, Social and Cultural Rights' (1995) *International Commission of Jurists: The Review* No 55 23

Chaskalson, A; Mohamed, I; Langa, P; Van Heerden, H & Coebett, M 'The legal system in South Africa 1960 – 1994' *Representations to the Truth and Reconciliation Commission* (1998) 15 *South African Law Journal* 21

Chaskalson, A 'Law in a changing society' (1989) 5 *South African Journal on Human Rights* 293

Chayes, A 'The role of the judge in public law litigation' (1979) 89 *Harvard Law Review* 1281

Chenwi, L & Mbazira, C 'The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) *ESR Review* 9

Christmas, A 'Property rights of landowners vs socio-economic rights of occupiers' (2004) 5 *ESR Review* 11

Corbett, M 'Representations to the Truth and Reconciliation commission' (1998) 115 *South African Law Journal* 17

Cowling, G 'Judges and the protection of human rights in South Africa: Articulating the inarticulate premise' (1987) *South African Journal on Human Rights* 177

Creamer, K 'The implications of socio-economic rights jurisprudence for government planning and budgeting: The case of children's socio-economic rights' (2004) 2 *Law, Democracy and Development* 221

Currie, I 'Judicious avoidance' in (1999) 15 *South African Journal on Human Rights* 138

Davis, D 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301

Davis, D 'The case against the inclusion of socio-economic demands in a bill of rights except as directive principles' (1992) 8 *South African Journal on Human Rights* 475

Davis, D 'Democracy: Its influence upon the process of constitutional interpretation' (1994) 10 *South African Journal on Human Rights* 103

Davis, D 'Democracy and integrity: Making sense of the Constitution' (1998) 14 *South African Journal on Human Rights* 127

Davis, D 'Socio-economic rights in South Africa: The record of the Constitutional Court after ten years' (2004) 5 *ESR Review* 3

Dennis, J & Stewart, P 'Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?' (2004) 98 *American Journal of International Law* 462

De Villiers, B 'Socio-economic rights in a new constitution: Critical evaluation of recommendations of the South African Law Commission' (1992) 3 *Journal of South African Law* 421

De Visser, J 'A perspective on local government's role in realising the right to housing and the answer of the *Grootboom* judgment' (2003) 7 *Law, Democracy and Development* 201

De Vos, P '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258

De Vos, P 'Pious wishes or directly enforceable rights? Social and economic rights in South Africa's 1996 Constitution' (1997) *South African Journal on Human Rights* 67

De Vos, P 'The economic and social rights of children in South Africa's transitional Constitution' (1995) 2 *SA Public Law* 233

De Waal, J & Erasmus, G 'The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition' (1996) 7 *Stellenbosch Law Review* 179

Dlamini, C 'The South African Law Commission's Working Paper on group and human rights: Towards a bill of rights for South Africa' (1990) *S A Public Law* 96

Donald, L 'Thinking about constitutionalism at the start of the twenty-first century' (2000) 30 *The Journal of Federalism* 115

Donnelly, J 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 281

Dugard, J 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' in (2006) 22 *South African Journal on Human Rights* 261

Eide, A 'Realisation of social and economic rights and the minimum threshold approach' (1989) 10 *Human Rights Law Journal* 35

Epstein, A 'Judicial review: Beckoning on two kinds of error' (1985) 4 *Cato Journal* 711

Eisenberg, T & Yeazell, S 'The ordinary and the extraordinary in institutional litigation' (1980) 93 *Harvard Law Review* 465

Fagan, A 'In defence of the obvious – Ordinary meaning and the identification of constitutional rules' (1995) 11 *South African Journal on Human Rights* 545

Fiss, O 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1

Fiss, O 'Against settlement' (1984) 93 *Yale Law Journal* 1073

Fletcher, W 'The discretionary Constitution: Institutional remedies and judicial legitimacy' (1982) *Yale Law Journal* 635

Forsyth, C 'Interpreting a bill of rights: The task of a reformed judiciary' (1991) 7 *South African Journal on Human Rights* 1

Forsyth, C & Elliot, M 'The legitimacy of judicial review' (2003) *Public Law* 286

Fredman, S 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *South African Journal on Human Rights* 163

Freeden, M 'Human rights and welfare: A communitarian view' (1990) *Ethics* 489

Fuller, L 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353

Frug, E 'The judicial power of the purse' (1978) *University of Pennsylvania Law Review* 715

Gabriel, A 'Socio-economic rights in the Bill of Rights: Comparative lessons from India' (1997) 1 *The Human Rights and Constitutional Law Journal of Southern Africa* 9

Gewirtz, P 'Remedies and resistance' (1983) 92 *Yale Law Journal* 585

Gleick, P 'The human right to water' (1998) 1 *Water Policy* 487

Gready, P & Kgalema, L 'Magistrates under apartheid: A case study of the politicisation of justice and complicity in human rights abuse' (2003) 19 *South African Journal on Human Rights* 141

Haysom, N 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451

Henrard, K 'Post-apartheid South Africa's democratic transformation process: Redress of the past, reconciliation and "unity in diversity"' (2002) 3 *The Global Review of Ethno Politics* 18

Heywood, M 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign's case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278

Heywood, M 'Contempt or compliance? The *TAC* case after the Constitutional Court judgment' (2003) 4(1) *ESR Review* 7

Hoexter, C 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484

Hunt, P 'Reclaiming economic, social and cultural rights' (1993) 1 *Waikato LR* 141

Iles, K 'Limiting socio-economic rights: Beyond the internal limitation clauses' (2004) 20 *South African Journal on Human Rights* 448

Iles, K 'A fresh look at limitations: Unpacking section 36' (2007) 23 *South African Journal on Human Rights* 68

Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 147

Kenneth, R 'Defending economic, social and cultural rights: Practical issues faced by an international human rights organisation' (2004) 26 *Human Rights Quarterly* 63

Keating, G 'Distributive and corrective justice in tort law of accidents' (2000) 74 *Southern California Law Review* 193

Khoza, S 'The importance of a dialogue on strategies to promote socio-economic rights in South Africa' (2006) 7 *ESR Review* 6

Klaaren, J 'The structure of government in the 1996 South African Constitution: Putting democracy back into human rights' (1997) 13 *South African Journal on Human Rights* 3

Klimchuk, D 'On the autonomy of corrective justice' (2003) 23 *Oxford Journal of Legal Studies* 49

Klug, H 'Introducing the devil: An institutional analysis of the power of constitutional review' (1997) 13 *South African Journal on Human Rights* 185

Kroeze, I 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* 252

Kroeze, I 'Doing things with values: The role of constitutional values in constitutional interpretation' (2001) 11 *Stellenbosch Law Review* 265

Langa, P 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351

Lenta, P 'Judicial restraint and overreach' (2004) 20 *South African Journal on Human Rights* 544

Labuschagne, P 'The doctrine of separation of powers and its application in South Africa' (2004) 23 *Politcia* 84

Levinson, D 'Rights essentialism and remedial equilibration' (1999) 99 *Columbia Law Review* 857

Levinson, D 'Making government pay: Markets, politics, and the allocation of constitutional costs' (2000) 67 *University of Chicago Law Review* 345

Liebenberg, S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) 6 *Law Democracy and Development* 159

Liebenberg, S 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' (2001) 17 *South African Journal on Human Rights* 232

Liebenberg, S 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1

Mbazira, C 'Translating socio-economic rights from abstract paper rights to fully-fledged individual rights: Lessons from South Africa' (2006) 12 *East African Journal of Peace and Human Rights* 183

Mbazira, C 'Enforcement of socio-economic rights in South Africa: Strengthening the reasonableness approach' (2008) 28 *Nordic Journal of Human Rights* 131

Mbazira, C '"Appropriate, just and equitable relief" in socio-economic rights litigation: The tension between corrective and distributive forms of justice" (2008) 8 *The South African Law Journal* 64

Mbazira, C 'From ambivalent to certainty: Norms and principles for structural interdicts in socio-economic rights litigation in South Africa' (2008) 24 *South African Journal on Human Rights* (forthcoming).

McAllister, D 'Doucet-Boudreau and the development of effective section 24(1) remedies: Confrontation or co-operation?' (2004) 16 *National Journal of Constitutional Law* 153

Mizikenge, D '*Minister of Health and Others v Treatment Action Campaign*: Its implications for the combat of HIV/AIDS and the protection of economic, social and cultural rights' (2003) 19 *East African Journal of Peace and Human Rights* 174

Modak-Truran, M 'Corrective justice and the revival of judicial virtue' (2000) 12 *Yale Journal of Law and Humanities* 249

Moellendorf, D 'Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims' (1998) 14 *South African Journal on Human Rights* 327

Moore, B 'Community conferencing as transformative problem solving' (2000) 24 *Spider News* 1

Moseneke, D 'Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309

Motala, Z 'Towards an appropriate understanding of the separation of powers, and accountability of the executive and the public service under the new South African order' (1995) 112 *South African Law Journal* 503

Mureinik, E 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464

Mureinik, E 'A bridge to where? Introduction to the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31

Muntingh, L & Mbazira, C 'Prisoners' right of access to anti-retroviral treatment' (2006) 7 *ESR Review* 14

Nagel, R 'Controlling the structural injunction' (1984) 7 *Harvard Journal of Law and Public Policy* 395

Neier, A 'Social and economic rights: A critique' (2006) 13 *Human Rights Brief* 1

Note, 'Implementation problems of institutional reform litigation' (1998) 91 *Harvard Law Review* 428

O'Regan, K 'Introducing socio-economic eights' (1999) 1 *ESR Review* 2

Park, J 'The constitutional tort action as individual remedy' (2003) 38 *Harvard Civil Rights-Civil Liberties Review* 393

Peces-Barba, G 'Reflections on economic, social and cultural rights' (1981) 2 *Human Rights Law Journal* 281

Peiris, G 'Public interest litigation in the Indian sub-continent: Current dimensions' (1991) 40 *International and Comparative Law Journal* 66

Pieterse, M 'Towards a useful role for section 36 in social rights cases? *Residents of Bon Vista Mansions v Southern Metropolitan Council*' (2003) 120 *South African Law Journal* 41

Pieterse, M 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383

Pieterse, M 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 882

Pieterse, M 'Resuscitating socio-economic rights: Constitutional entitlement to health services' (2006) 22 *South African Journal on Human Rights* 473

Pillay, A 'Access to land and housing' (2007) 3 *International Journal of Constitutional Law* 544

Pillay, D 'Law's republic, democracy and the South African Constitution' (2002) 17 *South African Public Law* 319

Pillay, K 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' (2002) 2 *Law, Democracy and Development* 225

Pilkington, M 'Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms' (1984) *Canadian Bar Review* 517

Powell, F 'The original understanding of original intent' (1985) 98 *Harvard Law Review* 885

Pretorius, M 'The origins of the *functus officio* doctrine, with specific reference to its application in administrative law' (2005) 122 *South African Law Journal* 832

Quinot, G 'An administrative law perspective on "bad buildings" evictions in Johannesburg (2007) 8 *ESR Review* 25

Rehnquist, W 'The notion of a living constitution' (1976) *Texas Law Review* 693

Roach, K 'The limits of corrective justice and the potential of equity in constitutional remedies' (1991) 33 *Arizona Law Review* 859

Roach, K & Budlender, G 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable' (2005) 122 *The South African Law Journal* 325

Robertson, E 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 693

Roux, T 'Understanding *Grootboom* - A response to Cass R. Sunstein' (2002) 12 *Constitutional Forum* 41

Roux, T 'Legitimating transformation: Political resource allocation in the South African Constitutional Court' (2003) 10 *Democratisation* 92

Rycroft, A 'Judicial innovation and the delinquent state: A note on the *State and Mfezeko Zuba and 23 Similar* cases' (2004) 20 *South African Journal on Human Rights* 321

Sabel, F & Simon, H 'Destablisation rights: How public interest litigation succeeds' in (1999) 113 *Harvard Law Review* 1

Sachs, A 'A bill of rights for South Africa: Areas of agreement and disagreement' (1989) 21 *Columbia Human Rights Law Review* 13

Sager, F 'Fair measure: The legal status of underenforced constitutional norms' (1978) 91 *Harvard Law Review* 1212

Sandalow, T 'Constitutional interpretation' (1981) 79 *Michigan Law Review* 1033

Sarkin, J 'The political role of the South African Constitutional Court' (1997) 114 *South African Law Journal* 134

Schauer, F 'Neutrality and judicial review' (2003) 22 *Law & Philisophy* 217

Schauer, F 'The calculus of distrust' (1991) 77 *Virginia Law Review* 653

Schroeder, H 'Corrective justice, liability for risk, and tort law' (1990) 38 *UCLA Law Review* 143

Schwarzschild, M 'Public law by private bargain: Title VII consent decrees and the fairness of negotiated institutional reform' (1984) *Duke Law Journal* 887

Scott, C 'Towards a principled, pragmatic judicial role' (1999) 1 *ESR Review* 4

Scott, L 'Another step towards indivisibility: Identifying the key features of violations of economic, social and cultural rights' (1998) 20 *Human Rights Quarterly* 81

Scott, C 'Reaching beyond (without abandoning) the category of "economic, social and cultural rights"' (1999) 21 *Human Rights Quarterly* 633

Scott, C & Alston, P 'Adjudicating constitutional priorities in a transitional context: A comment on *Soobramoney*'s legacy and *Grootboom*'s promise' (2000) 16 *South African Journal on Human Rights* 206

Scott, C & Macklem, P 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1

Shaibani, S 'Psychodynamics of the judicial process' (1999) 1 *Stanford Journal of Legal Studies* 1

Shane, P 'Rights, remedies and restraint' (1988) 64 *Chicago-Kent Law Review* 531

Sloth-Nielsen, J 'Too little? Too late? The implications of the *Grootboom* case for state response to child headed households' 2003 (1) *Law, Democracy and Development* 113

Smith, L 'Restitution: The heart of corrective justice' (2001) 79 *Texas Law Review* 215

Special Project, 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* 784

Steinberg, C 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264

Sturm, S 'A normative theory of public law remedies' (1991) 79 *Georgetown Law Journal* 1355

Sunstein, C 'Against positive rights' (1993) *East Europe Constitutional Review* 35, excerpt in Steiner, H & Alston, P *International human rights in context: Law, politics, morals* (2000) Oxford University Press 280

Sunstein, C 'Suing government: Citizen remedies for official wrongs. By Peter Schuck' Book review (1983) 92 *Yale Law Journal* 749

Swart, M 'Left out in the cold? Grafting constitutional remedies for the poorest of the poor' (2005) 21 *South African Journal on Human Rights* 2150

Trengrove, W 'Judicial Remedies for violations of socio-economic rights' (1999) 1 *ESR Review* 8

Troper, M 'The logic of justification of judicial review' (2003) 1 *International Journal of Constitutional Law* 99

Tushnet, M 'Judicial review' (2003) 20 *Harvard Journal on Legislation* 453

Tushnet, M 'Enforcing socio-economic rights: Lessons from South Africa' (2005) 6 *ESR Review* 2

Tushnet, M 'Social welfare rights and the forms of judicial review' (2004) 82 *Texas Law Review* 1895

Tushnet, M 'Democracy versus judicial review' (2005) *Dissent Magazine* 1

Van Bueren, G 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal on Human Rights* 52

Van der Vyver, JD 'The separation of powers' (1993) 8 *SA Public Law* 177

Van der Walt, AJ 'The state's duty to protect owners v the state's duty to provide housing: Thoughts on the *Modderklip* case' (2005) 21 *South African Journal on Human Rights* 144

Van der Walt, AJ 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* 253

Varney, H 'Forging new tools: A note on *Fose v Minister of Safety and Security* CCT 14/96' (1998) 14 *South African Journal on Human Rights* 336

Weinrib, E 'Corrective justice in a nutshell' (2002) 52 *University of Toronto Law Journal*, available online at http://www.utpjournals.com/product/utlj/524/524_ weinrib.html (accessed 22 June 2006)

Weinrib, W 'Restitutionary damages as corrective justice', in 1 *Theoretical inquiries in law (online edition)* (2000) 1 *Article 1*, at p 3, available at http://www.bepress.com/til/voll/iss1/art1 (accessed on 24 June 2006)

Wesson, M '*Grootboom* and beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal on Human Rights* 284

Whitman, C 'Constitutional torts' (1980) 79 *Michigan Law Review* 5

Whittington, E 'An "indispensable feature"? Constitutionalism and judicial review' (2002) 6 *Legislation and Public Policy* 21

Wilson, S 'A new dimension of the right to housing' (2006) 7 *ESR Review* 9

Yigen, K 'Enforcing social justice: Economic, and social rights in South Africa' (2002) 4 *International Journal of Human Rights* 13

Conferences, seminars, workshops, short courses and guest research programmes attended

Intensive Course on the Justiciability of economic, social and cultural rights, organised by the Institute for Human Rights, Åbo Akademi University – November/December 2004 at Åbo Akademi University, Turku

Out-sourcing/Privatisation of Basic Services at the Local Government Level in SA: Democracy, Human Rights Norms and Good Governance Principles, organised by the Community Law Centre, University of the Western Cape 22 October 2004

Water Delivery in South Africa and the Netherlands: Public or Private? Organised by the Community Law Centre, University of the Western Cape together with the Institution of Constitutional and Administrative Law, Utrecht University – March 2005, Utrecht University

The Judiciary in a changing terrain, Organised by the Institute for Democracy in South Africa (IDASA), 11th – 12th October 2005 Cape Town

The Research Unit for Legal and Constitutional Interpretation (RULCI) Colloquium on Constitutional Interpretation and Theory, Faculty of Law, University of Cape Town 20th – 21st October 2005

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

Summer School, *Peace and Development in Africa*, Institute of Development and Development Policy, University of Bochum, Germany, 25 September – 1st October 2005

Moving rights to realities: Realising socio-economic rights, Organised by Basic Rights Campaign in conjunction with the Kenya National Commission on Human Rights, 26th – 29th June 2005, Mombasa, Kenya

Summer School *DAAD High Education Forum; Capacity Building and Development for Communities in Sub-Saharan Africa*, Centre for Development Research, ZEF, University of Bonn, Germany, 2nd – 7th October 2005

35th and 38th Sessions of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia in April/May 2004 and November/ December 2005 respectively

Constitutional Law of South Africa public lecture series, Organised by the Center for Human Rights, University of Pretoria, 28 – 30 March 2006

Delivering Municipal Services: Socio-Economic Rights and Outsourcing Options, organised by the Community Law Centre, University of the Western Cape, 11 November 2005

3rd Dullah Omar Memorial Lecture organised by the Community Law Centre and the Faculty of Law at the University of the Western Cape, 13 June 2006 [attended by the author], Chief Justice Arthur Chaskalson delivered speech as guest speaker titled 'Implementing socio-economic rights: The role of the courts'

Guest research, Norwegian Centre for Human Rights, 9 October – 3 November 2006

Reports and policy documents

African National Congress, *The bill of rights for a democratic South Africa*, 1988. Sourced at http://www.anc.org.za/ancdocs/policy/constprn.htm (accessed on 18 May 2005)

African National Congress, *Constitutional Principles for a Democratic South Africa* 1991, sourced at http://www.anc.org.za/ancdocs/policy/constprn.htm (accessed 18 May 2005)

Constitutional Assembly, Constitutional Committee, Draft Bill of Rights, Volume 1, *Explanatory Memoranda of Technical Committee to Theme Committee IV of the Constitutional Assembly* (9 October 1995), [on file with author]

National Department of Housing, *Part 3*: *National Housing Programme*: *Housing Assistance in Emergency Circumstances* April 2004; available at http://www.housing.gov.za/Content/legislation_policies/_Emergency%20%20Housing%20Policy.pdf (accessed on 29 November 2005)

South African Law Commission *Interim Report on Group and Human Rights* Project 58, August 1991

South African Law Commission *Final Report on Group and Human Rights* Project 58, October 1994

The Freedom Charter, adopted by the Congress of the People at Kliptown on 26 June 1955. Sourced at http://www.anc.org.za/ancdocs/history/charter.html accessed on 17 May 2005

Internet sources

BBC News 'Bush and democrats locked on Iraq'. Sourced at http://news.bbc.co.uk//2/hi/americas/6616361.stm (accessed on 3 May 2007).

Bhagwati, P 'The role of the judicray in the democratic process: Balancing activism and judicial restraint' paper presented at the *Fifth Judicial Colloquium on The Domestic Application of International Human Rights Norms, Oxford, 21-23 September 1992, Commonwealth Secretariat*, sourced at htt://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/bhagwati.pdf accessed on 5 December 2005

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

Bridgeman, C '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 (accessed on 22 June 2006)

Center for Study of Social Policy (CSSP)'s report on *New roles for old adversaries: The challenge of using litigation to achieve system reform* January 1998, available at htt://www.cssp.org/uploadFiles/New_for-old_adversaries.pdf (acessed on 30 November 2005)

Curie, M 'Civil society – conceptual history from Hobbes to Marx' (2001) Working Paper *International Politics*, sourced at http://www.aber.ac.uk/interpol/phD/Dorota.pdf (accessed on 22 January 2006)

Garret, B Structural reform prosecution University of Virginia Law School, Public law and legal theory working paper series No. 50 (2006), sourced at http://law.bepress.com/cg/viewcontent.cg?article=uvalwpa (accessed on 25 October 2006)

International Labour Organisation http://www.ilo.org/public/english/about/history.htm (accessed on 27 April 2005)

Legal history and philosophy *Legal maxims and other quotes from Lord Coke* http://www.commonlaw.com/index.html (accessed on 22 June 2006)

Levinson, D 'Rights essentialism and remedial equilibration' (1999) Working paper No. 99-5 *Legal Studies Working Paper Series*, University of Virginia School of Law, at p 3, available at SSRN: http://ssrn.com/abstract=155564 (accessed on 25 June 2006)

Liebenberg, S 'South Africa's evolving jurisprudence on socio-economic rights' (2002) Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, sourced at http://www.communitylawcentre.org.za/ser/docs_2002/evolving_jurisprudence.pdf (accessed on 11 February 2006)

Liebenberg, S 'Needs rights and transformation: Adjudicating social rights' *Center for Human Rights and Globala Justice Working Paper No. 8, 200*5, sourced at http://www.nyuhr.org/docs/wp/Liebenberg%20%20Needs,%20Rights%20and%20Transformation.pdf (accessed on 23 March 2006)

Muralidhar, S *Implementation of court orders in the area of social and economic rights: An overview of the experience of the Indian judiciary*, available at htt://www.humanrightsinitiative.org/jc/papers/j_2004/supplementary papers/muralidhar.pdf (accessed on 20 June 2006)

Otto, D & Wiseman, D (2001) 'In search of "effective remedies": Applying the International Covenant on Economic, Social and Cultural Rights to Australia' Faculty of Law, the University of Melbourne, Public Law and Legal Theory Working Paper No.15, sourced at http://papers.ssrn.com/paper.taf?abstract_id=270908 (accessed on 10 April 2006)

Polinsky, M and Shavell, S 'The economic theory of public enforcement of law' *John M. Olin Program in Law and Economics, Working Paper 159* (1998), sourced at http://papers.ssrn.com/paper.taf?abstract_ id=93709 (accessed on 28 July 2006)

Robertson, B 'Economic, social and cultural rights: Time for a reappraisal' *New Zealand Business Roundtable* September 1997 First published in 1997 by New Zealand Business Roundtable, Wellington, New Zealand, sourced at http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm (accessed on 23 January 2005)

Smith, L *Restitution: The heart of corrective justice* available at http://www.utexas.edu/law/conferences/restitution/smith.pdf (accessed on 24 June 2006)

South Africa justice sector and the rule of law, Report by AfriMAP and Open Society Foundation for South Africa, sourced at http://www.soros.org/

resources/articles_publications/publications/sajustice_20060223/afrimapreport_20060223.pdf (accessed on 18 October 2006)

Submissions of the Community Law Centre and IDASA in *Minister of Health and Others v Treatment Action Campaign and Others*, sourced at http://www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc (accessed on 22 February 2006)

Sullivan, S 'The role of the independent judiciary' in *Freedom Paper No. 4*, sourced at htt://usinfo.state.gov/products/pubs/archive/freedom/freedom4.htm (accessed on 19 January 2006)

Sundram, C '*Wyatt v Stickney* – A Long Odyssey reaches an end' available at http://www.aamr.org/Reading_Room/pdf/wyatt.shtml (accessed on 6 September 2006)

Sunstein, C 'Social and economic rights? Lessons from South Africa' *John M. Olivin Law and Economic Working Paper No. 124, Public Law and Legal Theory Working Paper No 12*, (Preliminary draft) sourced at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=269657 (accessed on 20 May 2005)

The Founder's Constitution, document, Volume 4 Document 4 available at http://press-pubs.uchicago.edu/founders/documents/amendV_due_process4.html (accessed on 22 June 2006)

Vallentyne, P *Distributive Justice* at http://www.missouri.edu/~klinechair/on-line%20papers/distributive%20justice%20(handbook).doc (accessed on 24 June 2006)

Vikas, J 'Social change and public interest litigation in India' (2005), Independent Media Center, India, available at htt://www.india.indymedia.org/en/ 2005/03/210205.shtml (accessed on 30 November 2005)

Zulman, R 'South African judges and human rights' paper presented to the *Supreme Court History Society* in the Banco Court, Supreme Court, Queensland. Australia on 4 July 2001 sourced at http://www.courts.qld.gov.au/publications/articles/speeches/2001/Zelman040701.pdf (accessed on 8 February 2006).

Unpublished papers

Australian Law Reform Commission (ALRC) Issues paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings*

Chirwa, D *Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms* (2005) (LLD, University of the Western Cape)

Cohen, M *How supervisory jurisdiction can save socio-economic rights in South Africa*, LLM dissertation (unpublished) University of Cape Town, February 2005 (on file with author)

Kanyeihamba, G 'The culture of constitutionalism and the doctrine of separation of powers' Paper presented at the *Public Lecture on State of Separation of Powers in Uganda*, organised by the Human Rights and Peace Centre, Faculty of Law, Makerere University 15 March 2001. (Unpublished, on file with author)

Langa, P 'The role of the court in the protection of human rights' paper delivered at a seminar titled *Democracy and Human Rights: A Southern African Perspective* organised by the Human Sciences Research Council (HSRC) in conjunction with the Foundation for Human Rights (FHR) as part of the launch of the *Human Rights Lecture Series*, 7 September 2005 (on file with author)

Pieterse, M *A benefit-focused analysis of constitutional health rights* PhD thesis submitted to the University of Witwatersrand (December 2005)

Sunstein, Cass R 'Social and Economic Rights? Lessons from South Africa' (May 2001). *Public Law Working Paper No. 12; University of Chicago Law & Economics, Olin Working Paper No 124.* Sourced at http://papers.ssrn.com/paper.taf?abstract_id=269657 (accessed on 27 July 2004)

Trengrove, W *What is the government spurs court orders?* Paper delivered at A focus on the Last Ten years of South Africa's Democracy Conference in Durban (22-25 January 2004)

Tushnet, M *Enforcing Social and Economic Rights* (Unpublished paper on file with author) A summarised version of this paper has been published under the title 'Enforcing socio-economic rights: Lessons from South Africa' in (2005) 6 *ESR Review* 2

Viljoen, F 'The justiciability of socio-economic and cultural rights: Experience and problems' (Unpublished paper on file with author)