Judicial remedies and socio-economic rights

A response to Christopher Mbazira

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Christopher Mbazira has produced a lucid, well-researched and thorough study of judicial remedies in cases concerning socio-economic rights. This response seeks to engage critically with Mbazira's claims by raising certain questions and issues stimulated by his work that could be developed further.

Mbazira seeks to investigate the normative underpinnings of judicial remedies and contends that there are two main models in this regard: first, the model of corrective justice and second, the model of distributive justice. Corrective justice, he argues, is linked to the philosophy of libertarianism, while distributive justice is supported by the philosophy of utilitarianism.

The problem with strong binary oppositions is that, although they can be theoretically illuminating, they

are rarely as rigid as they appear. Mbazira's theoretical framework appears to me to create an overly strong distinction between these two models. Certain ways in which he characterises these models may also be disputed.

First, corrective justice seeks to correct wrongs that have been done. When we are dealing with socio-economic rights, we are talking about wrongs in relation to the distribution of social goods and resources. The notion of "corrective justice" is thus premised upon the idea that there is some moral order in terms of which the "wrong" is defined. It is thus arguable that in order to determine what needs correction, one needs a theory of distributive justice in the first place. Corrective justice may thus be parasitic upon a theory of distributive justice in the context of wrongs that relate to individuals who have insufficient resources.

Secondly, distributive justice in political philosophy generally refers to the distribution of benefits and burdens among individuals. There are different theories as to what distribution of resources may be regarded as just. It is not accurate to see all forms of distributive justice as premised upon utilitarian theory. Rather, utilitarianism is a particular theory of distributive justice which defines a just distribution as one which produces the greatest amount of happiness (or utility) for the greatest number.

This theory has been subjected to a number of telling criticisms. Rawls, for instance, points out that the utilitarian principle is not primarily concerned with the distribution of happiness among individuals: the aggregating focus of the principle can thus leave some very badly off, provided the general happiness is maximised. Thus if neoliberal economic policies promote the general welfare but leave some very badly off, utilitarianism could promote such policies, and yet we may think it is incorrect to do so.

Rawls famously sets out an alternative theory of distributive justice in his book *A theory of justice*. He outlines two principles of justice: a distribution will be just, according to his theory, if it provides equal liberty rights to everyone and if it only allows for inequality in social and economic resources where such inequalities are to the benefit of the least advantaged. Rights-based theories – such as that of Rawls – seek to avoid the utilitarian problem by ensuring that individuals at least have certain basic rights and resources that they do not lose.

Libertarianism is traditionally regarded as a rights-based theory of a kind that posits certain strong negative rights. In Nozick's most famous modern version of this theory, a just distribution is one in which every individual is entitled to hold the resources they possess. Nozick outlines principles of acquisition and transfer that provide for when entitlements are legitimate. Corrections to existing distributions are generally only legitimate where they arise from fraudulent or coercive transactions.

Thus, for Nozick, there is an existing set of entitlements that exhaust the claims of distributive justice. Corrective justice is really only a form of distributive justice in that it is a method of making good unjust distributions. For instance, given the unjust removal of many black people from their land in South Africa, land reform is required as a form of corrective justice that would aim to repair the injustices perpetrated in the past.

Thus it seems to me that the distinction between corrective and distributive justice is by no means clear-cut and the relationship between them needs to be developed further. This is of importance to Mbazira's broad thesis in relation to judicial remedies for the following reason. Social rights, as Mbazira recognises, generally raise distributive questions which can be related to different possible philosophical foundations (and not simply a utilitarian theory). The particular distributive theory one adopts could perhaps have an impact on the nature of the remedies that will be provided by courts.

This is perhaps an area for future research. Do the remedies that are given by courts support a particular version of distributive justice? Would one theory of distributive justice require more stringent or different remedies from others? It is perhaps arguable that a Rawlsian approach (focusing on the worst off) might require more interventionist remedies, such as the structural injunction, than a purely utilitarian approach would. However, this requires further investigation.

It also seems to me that there are at least two possible justifications for ensuring that social rights are realised in South Africa. First, there is a type of "corrective justification" which suggests that socio-economic rights are essentially in the Constitution to correct the injustices of apartheid,

which sought to deprive a large segment of the population of land and resources as well as other rights. What we should seek to do, according to this approach, is to correct these historical injustices. Socio-economic rights provide one way of ensuring that each individual gets at least a certain amount of resources to correct the wrongs of prior deprivation. Such an approach, it seems, would be focused on the historical wrongs of apartheid and particularly upon previously disadvantaged groups.

Another more "universalistic justification" for socio-economic rights recognises that they are based in the fundamental interests of all individuals, a justification I have sought to develop in my book (Bilchitz, 2007). A society that seeks to treat individuals with equal importance or dignity, I argue, must recognise that each is entitled at least to a certain amount of resources with which to live their lives. I believe it is important for such an approach to distinguish between a minimum core threshold (or the most urgent needs of a being) and a higher threshold that should be realised progressively. Thus, in the context of housing, each individual would be entitled to at least shelter from the elements, which could then be developed over time so as to provide a more extensive form of state-subsidised housing.

At times Mbazira suggests that the resource implications of socio-economic rights are too great for such rights to be realised. This, though, does not seem justified empirically, particularly if only a minimum package of goods is required initially. The universalistic approach may also have an impact on the kinds of remedies a court will develop and the level of intrusiveness of the remedies. I therefore agree with Mbazira's argument that the content of rights and the nature of judicial remedies need to be tied closely together.

I have one more point to make about the individualistic nature of distributive remedies. Mbazira says that socio-economic rights require a consideration of collective or societal interests. This is perhaps influenced by his understanding of distributive justice as linked to the "general happiness". Yet it seems that these notions are not so apposite in this context. What Mbazira is acutely aware of and draws our attention to is that remedies in socio-economic rights cases cannot be ordered in isolation, for one individual, without the impact on others also being considered.

The courts should seek to adopt principled normative standards towards these rights and then give effect to those standards by adopting workable, effective and creative remedies.

This is perhaps the major flaw in the approach of the Brazilian courts. Essentially, for example, when an individual comes to court requesting medication, the courts order that the medication be provided. Those orders, however, distort the budget to such an extent that other individuals cannot acquire the life-saving medicines. The point is that an order for one individual will impact on other individuals. This is why it is necessary to adopt a more holistic view that embraces the wider impact of a case on a range of individuals.

However, it is equally important to resist the rhetoric that socio-economic rights exist at the "societal" or "general" level. We also need to be wary of the notion that a "societal" or "collective" interest can limit these rights. The interests protected by socio-economic rights remain those of individuals: what collective interest can be more important than ensuring individuals in a community do not starve or dehydrate?

Socio-economic rights, therefore, are essentially *individual* rights that nevertheless need to be considered in light of the equal importance of all individuals in the community. Such a consideration should not prevent courts from intervening in cases, nor overwhelm them with the complexity of the determinations in issue. The courts should rather seek to adopt principled normative standards towards these rights and then give effect to those standards by adopting workable, effective and creative remedies. This perhaps provides a good reason for the use in this context of structural injunctions which allow for the expertise and participation of other branches of government in devising just outcomes.

Mbazira has completed an impressive work that will help

our judges (and the academic community) think through the underlying assumptions as to which remedies should best be deployed in particular instances. He has worked on what is perhaps one of the most important elements of making socio-economic rights really count: namely, the very implementation of these rights. Hopefully, recent academic work on the normative content of socio-economic rights, together with this important work on remedies, will have the result that socio-economic rights no longer just exist on paper, but are translated into reality for the countless individuals who need their protection.

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References

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