The Challenges of Crafting Remedies for Violations of Socio-economic Rights

Kent Roach*

1. INTRODUCTION

A common objection to the full recognition of social, economic and cultural (socio-economic) rights is the difficulty of crafting meaningful remedies. A received remedial tradition suggests that political and civil rights can be fairly easily enforced by backwards looking compensatory remedies, such as damages for aggrieved individuals. Such remedies lie within the core jurisdiction of domestic courts and often mimic the remedial process and aims of private law. In contrast, socio-economic rights may require more complex remedies such as declarations or injunctions that invite or require positive governmental action. They also raise difficult tensions between achieving corrective justice for the individuals before the court as opposed to distributive justice for larger groups not before the court. In addition, there are also tensions between ordering compensation for past violations and ensuring compliance in the future, with related tensions between achieving instant remedies that correct discrete violations as opposed to the commencement of a much more drawn out and uncertain process of systemic reform. The complex and uncertain enforcement process that is posted for socio-economic rights seems to be a better fit for the more political enforcement processes of international than domestic law. International law relies on persuasion and dialogue while domestic law employs a monological and coercive process to enforce rights, especially with negative civil and political rights.

In the first part of this chapter, I outline in greater detail the above dichotomies between a received remedial tradition that focuses on the correction of past violations suffered by individuals and a more complex remedial process with distributive and dialogic implications. In the second part, I argue that the dichotomies between simple correction of violations of political and civil rights and the admittedly difficult process of obtaining compliance with socio-economic rights dramatically underestimate the remedial complexities that are already present in the enforcement of political and civil rights. The distributional implications of traditional remedies are also underlined by the fact that some socio-economic rights can be enforced by traditional remedies such as damages, restitution and declarations of invalidity. A stark dichotomy between simple remedies required for civil and political rights and more complex remedies for socio-economic rights also ignores the increasing interdependency between domestic and international law and the dialogic turn in domestic constitutional law in many countries including Canada, India, New Zealand, South Africa, the United Kingdom and the United States. The received remedial tradition of corrective justice is inadequate for the enforcement of many civil and political rights. Recognition of a more complex, contingent and dialogical remedial process narrows the gap between traditional political and civil rights and socio-economic rights and between domestic and international enforcement of rights.

The last part of this chapter outlines the range of remedies available to enforce socio-economic rights in domestic, regional and international law. Traditional corrective remedies such as damages, restitution and immediate declarations of constitutional invalidity can play a role in enforcing socio-economic rights, but I suggest that more prospective and dialogic remedies such as declarations and delayed declarations of invalidity can also play a role. At the same time, I argue that

* Professor of Law and Prichard-Wilson Chair in Law and Public Policy, University of Toronto.
not all remedies for socio-economic rights will be soft and prospective and that injunctions, including the exercise of supervisory jurisdiction by the courts, should be available to ensure meaningful and effective remedies for socio-economic rights in cases where it is clear that governments are either unwilling or unable to respect such rights. Finally, I suggest that some of the gap between achieving justice for individual litigants in desperate conditions and achieving broader systemic reform for larger groups not before the court can be bridged by two-track remedial strategies in which courts order interim and immediate remedies to repair and prevent irreparable harm while at the same time pursuing a longer process of achieving systemic reforms.

I am not the first to argue that the received remedial tradition is inadequate. Harvard law professor Abram Chayes first recognised the inadequacy of the idealised vision of remedies in his seminal 1976 article entitled 'The Role of the Judge in Public Law Litigation'. Professor Chayes argued that in the wake of Brown v. Board of Education American courts were ordering more complex and ongoing remedies in order to reform public institutions and assist disadvantaged groups. He contrasted a 'received tradition' based on bi-polar, retrospective, self-contained and party-controlled litigation with an emerging public law style of litigation which featured multiple parties and an active judiciary concerned more with the development of public policy than the settlement of disputes. Under the received tradition, the remedy was 'derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty – in contract by giving plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused'. In contrast, in public law litigation 'relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees'. Such complex public law remedies were often the process of negotiation and persuasion as opposed to coercive correction.

The important work of the late Professor Chayes is also a testament to the increasing interdependence of domestic and international law. He carried many of the insights of his 1976 article into subsequent work on the operation of international law and international institutions. In both fields, he suggested that law was actualised more by an ongoing process of persuasion than by coercion and retrospective corrections of harms. Professor Chayes never applied his theory of remedies to the enforcement of socio-economic rights, but it provides an important intellectual foundation for greater acceptance of the concept that such rights can be enforced by both domestic courts and international bodies. In other words, rejection of the received remedial tradition opens up the prospect of domestic courts and international bodies engaging governments in an ongoing process of continued dialogue and persuasion about the importance and possibility of achieving greater compliance with socio-economic rights.

2. RECEIVED REMEDIAL DICHOTOMIES

2.1 Corrective Justice versus Distributive Justice

Aristotle identified corrective justice as 'that which plays a rectifying part in transactions between man and man' and opposed it to distributive justice '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'. Many theorists have argued that courts are best suited to achieving corrective justice between the two parties to a private dispute and that distributive justice among citizens should be left to legislatures.

Most traditional descriptions of the remedial functions of courts proceed on corrective assumptions, which assume a close connection between

3 Chayes, 'The Role of the Judge' (n.1 above), at 1305–1306.
the violation of a right and the crafting of a remedy to repair the harm caused by the rights violation. For example, William Blackstone appealed to a theory of corrective justice when he famously wrote that it was 'a settled and invariable principle in the laws of England that every right when withheld must have a remedy and every injury its proper redress'. Blackstone's understanding of remedies informed the decision of Marbury v. Madison, which asserted powers of judicial review in part on the basis that an individual is entitled 'to claim the protection of the laws, whenever he receives an injury'. A similar theme is found in the work of Albert Venn Dicey, who insisted that private law-making methodology should inform constitutional law and, in particular, the provision of remedies for violations of constitutional rights.

He wrote that the process of providing 'remedies for the enforcement of particular rights' was the 'averting of definite wrongs'. This was the foundation for Dicey's famous statement that 'there runs through the English constitution that inseparable connection between the means of enforcing a right and the right to be enforced... The saw ubi jus ibi remedium (where there is a right, there is a remedy) becomes from this point of view something much more important than a mere tautological proposition'. All of the above commentators applied private law methodologies to public law. It is possible to see remedies such as the exclusion of improperly obtained evidence or the provision of constitutional damages for aggrieved individuals as a form of corrective justice, while seeing more complex remedies that benefit groups as a form of distributive justice best left to the legislative and administrative process.

2.2 Individual versus Systemic Relief

There are several important corollaries for understanding remedies as an act of corrective justice. One is that the task of remedies is to provide relief for discrete harms suffered by an individual and not to engage in systemic relief aimed either at reforming large public bureaucracies or producing new legislation or governmental programs. The corrective theory of remedies assumes that justice can only be done for the individuals before the court and not for larger groups that may not be before the court or who are imperfectly represented by mechanisms such as class actions.

2.3 Immediate versus Delayed Remedies

Another corollary of a corrective understanding of remedies is that the remedy can be immediate once the court finds that the government has violated a right and the extent of the harm caused by the violation has been established. Damages are a preferred remedy because they allow for a single act of rectification or correction with no continuing involvement by the court. Declarations and injunctions are not preferred remedies in part because they require governments to take steps in the future to implement their dictates. Immediate remedies are also the norm in constitutional law. Since Marbury v. Madison, courts have struck down laws to the extent of their inconsistency with the constitution with immediate effect, based on the assumption that such negative and immediate remedies will achieve compliance with the constitution.

2.4 Common Law versus Equity

Another dichotomy that has affected thinking about remedies is the assumption that damages are a preferred remedy to equitable remedies in which courts require defendants to engage in certain activities in order to achieve compliance. Injunctions are problematic because they purport to compel the government to act and because they may require continued judicial involvement. Damages for individuals or remedies that resemble damages in their focus on compensation are the preferred remedies in the received remedial tradition.

2.5 Monologue versus Dialogue

Although the received remedial tradition views injunctions as an extraordinary remedy, it does accept the idea that remedies are part of a coercive and authoritative process through which the

---

8 Marbury v. Madison 5 U.S. 1 (1 Cranch) 137 at 163 (1803).
court enforces the law. The remedial process is a coercive monologue in which judges lay down the law and settle disputes. The idea that a judge would engage in an ongoing re-iterative and dialogic process would be seen in the received remedial tradition as a sign that the judge had abandoned the law and descended into politics with its consequent use of negotiation and bargaining as opposed to authoritative adjudication.

2.6 Domestic Law versus International Law

The received remedial tradition of corrective justice pre-dates the emergence of international and regional law and conceives of domestic courts as the exclusive source of both authoritative adjudication and remedies. The 'hierarchical processes of adjudication or enforcement' and the coercive process of ensuring that where there is a right, there is a remedy at domestic law can be contrasted to international law, which most commonly works through drawn out processes of requiring states to report back on steps that they have taken to comply with the law. The received tradition reflects a dualist approach that emphasises the separateness of domestic and international law. More specifically, it suggests that international law is less law-like than domestic law because it cannot deliver on the corrective promise of rights being enforced by one-shot coercive remedies.

3. CHALLENGING THE REMEDIAL DICHOTOMIES

3.1 The Distributive Implications of Civil and Political Rights

Corrective justice ignores the role of corrective remedies in enforcing pre-existing distributions of resources and traditional property rights. The corrective remedial goal of restoring the status quo ante will benefit economically advantaged people by attempting to return them to the position they occupied before the injury. Corrective justice assumes the justness of the pre-existing distributions of resources and property rights in society.

The received remedial tradition underestimates the distributive and systemic effects of one-shot corrective remedies on modern bureaucratic government. For example, a standard remedy in domestic constitutional law is a stay of proceedings as a remedy to correct the violation of an accused person's right to a trial in a reasonable time or a damage award to repair the violation of a prisoner's right to humane treatment. At one level, the remedy is designed to achieve corrective justice for the individual by placing that individual in the same position that he or she would have occupied had the State not violated his or her rights. Although the remedy is conceived as an individual remedy, it occurs in the bureaucratic context of modern government and as such will have complex repercussions. A stay of proceedings to enforce a constitutional right to a trial in a speedy time can indirectly require the state to spend more funds to improve the efficiency of trials throughout the criminal justice system to ensure that similarly situated individuals do not receive stays of proceedings in the future. Likewise a damage award or a grant of habeas corpus arising from unconstitutional conditions of confinement may in substance require the state to devote more resources to prisons or mental institutions. The fact in both cases that the remedies are understood as individual and retrospective may in fact make the court less sensitive to the complex distributional and regulatory implications of the nominally individual remedy.

3.2 Systemic Claims Raised by Individuals

Although remedial claims for violations of political and civil rights are often understood as claims of individual rights, they often implicate larger groups. The nature of modern government means that justice for an individual will often require systemic measures that will deliver justice to much larger groups. In the above example, providing individuals with a trial in a reasonable time or humane conditions of confinement will of necessity require the government to reform large bureaucracies so that larger groups also receive better treatment. The conditions of modern bureaucracies often break down the distinction

---

between individual and systemic relief, even in
the administration of traditional political and civil
cracks that aim to protect individuals from unjust

treatment.

3.3 The Management of Delay

The received remedial tradition posits a process
in which remedies can be achieved immediately
by the order of damages or other remedies that
restore the status quo ante. Delays either in litigating or receiving the actual remedy may often
be underestimated. Many jurisdictions are now
recognising that delay is sometimes inevitable.
The turning point was probably the United States
Supreme Court’s decision in Brown v. Board of
Education II that school desegregation could not
be achieved instantaneously, but would involve a
complex process in which school boards proposed
desegregation plans that were then reviewed by
trial courts. This ‘all deliberate speed’ process
is notorious because of the extensive delay and
resistance it caused. At the same time, however,
the plan submission and review process used in
school desegregation cases have become standard
in many other cases, in both domestic and inter­
national law. Incremental and reiterative reme­
dial processes take place regardless of whether the
underlying rights being vindicated are traditional
political and civil rights, such as the right against
cruel and unusual punishment, or more positive
rights, such as the right to health care or housing.
The complexities of modern bureaucracies chal­
lenge the traditional model of immediate reme­
dies because even the most immediate remedies
involving bureaucracy may require the manage­
ment of delay.

Traditional understandings of judicial review since
Marbury v. Madison have been based on an under­
standing that courts can and should strike down
laws to the extent of their inconsistency with the
constitution. Such an immediate remedy serves
the corrective task of having the court’s remedy
match and track its understanding of the substan­
tive right in question. At the same time, a num­
ber of devices have developed in international and
domestic law that contemplate a more drawn out,
complex and contingent remedial process. Vari­
ous rights adjudication bodies established under
international and regional law often do not inval­
idate non-compliant legislation but rather ask
states to report back to them on steps taken to
ensure future compliance with the relevant rights.
Such a remedial process often presumes that there
is more than one way for the State to achieve com­
pliance with the relevant right.

New ways to manage delay have also emerged in
domestic constitutional law. In Canada, the courts
have invented a new remedy, the ‘suspended or
delayed declaration of invalidity’. This remedy
allows courts to declare that a law is unconsti­
tutional but will remain in force for a period of six to
eighteen months in order to allow the relevant gov­
ernment to enact a new law that is consistent with
the constitution. This remedy assumes that there
is more than one way for governments to comply
with the relevant right. It was first used in a case
involving minority language rights and has also
proven useful in cases involving positive rights
to parental leave, rights to interpreters for deaf
patients and health care. The Supreme Court of
Canada has warned that striking down uncon­
stitutionally under-inclusive benefit schemes could
result in an unhealthy form of ‘equality with a
vengeance’11 and has recognised that a delayed
declaration of invalidity allows the legislature time
to extend and/or modify the impugned benefits.
Those on the Supreme Court of Canada who found
that social assistance rates violated rights stan­
dards would not have crafted their own remedy with
revised rates, but rather would have delayed a dec­
laration that existing benefits were inadequate for
an eighteen-month period in order to give the leg­
islature an opportunity to respond to the complex­
ities of reforming a social assistance program.12

Canada is not alone in the use of a delayed dec­
laration of invalidity. Section 172 of the South
African Constitution formally recognises this reme­
dy by providing that courts can suspend declara­
tions of invalidity on whatever terms they consider
appropriate and just. Section 4 of the United King­
dom’s Human Rights Act, 1998 also allows courts
to invite the legislature to enact remedial legisla­
tion. Judicial bodies that attempt to enforce posi­
tive rights may find themselves in a position some­
what closer to many international bodies than
traditional domestic courts that are able to achieve

corrective justice between the two parties to the dispute. 13

3.4 The Rise of Equity

As discussed above, a preference for the common law remedy of damages as opposed to equitable remedies such as declarations or injunctions is part of the received remedial tradition. At the same time, courts have in many jurisdictions made much greater use of equitable remedies in public law since the 1930s. Declarations of rights were first used in civilian systems but have become accepted as a public law remedy in many common law systems. Edwin Borchard argued that declaratory relief would allow courts to become 'an instrument not merely of curative but also preventive justice'. In contrast to theories of corrective justice which were based on the commission of definite wrongs, 'no “injury” or “wrong” need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty'. 14

In the 1970s, Abram Chayes developed his theory of public law litigation to explain the activism of American trial judges in crafting detailed orders to desegregate public schools and reform conditions in custodial institutions. 15 American courts, stressing their traditional equitable powers, issued detailed injunctions and retained jurisdiction in order to desegregate school systems through busing and other remedies and to reform prison conditions. They stressed that 'remedial judicial authority does not put judges automatically in the shoes of school authorities...judicial authority enters only when local authority defaults'. 16 American courts often retained jurisdiction over many years. The Supreme Court of India has embraced a similar approach and explained: As the relief is positive and implies affirmative action, the decisions are not 'one-shot' determinations but have on-going implications'. 17 The courts in both countries required specific reports on compliance to be given to the court or to a court-appointed assistant. The reiterative process of equity is better suited to managing the complexities of modern bureaucratic government than the one shot process of damage awards. Judges administering equitable remedies can use declarations when appropriate, but they can also engage in stronger injunctive forms of relief when appropriate. Damage awards, whether awarded against individuals or governments, can often be easily paid from general tax revenues and may not result in the appropriate internalisation of the costs of rights infringement or in systemic reforms to ensure that similar violations do not occur again in the future. 18

3.5 The Dialogic Turn in Domestic Constitutional Law

The received remedial tradition is premised on a monologic process in which courts enforce constitutional rights in a coercive manner on governments. Governments in turn have few responses to judicial constitutional remedies. They may disobey court orders as sometimes occurred in American controversies over desegregation or they can attempt to limit the jurisdiction of the courts or amend the constitution.

Much of the post-Second World War experience with rights, however, revolves around the development of a more dialogic approach to judicial review. 19 Post-war international rights protection instruments such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights contemplated dialogue between adjudicators and legislatures by allowing legislative limits and

14 E. Borchard, Declaratory Judgments, 2nd ed. (Cleveland: Banks-Baldwin Law Publishing, 1941), at xiv, 27.
15 Chayes, 'The Role of the Judge' (n.1 above).
18 On the difficulties of appropriate cost internalisation, see P. Schuck, Suing Government (New Haven: Yale University Press, 1983).
derogations to be placed on rights. This structure is also found in many domestic bills of rights, including those found in Canada, New Zealand, Israel, South Africa and the United Kingdom. Bills of rights, which contemplate back-and-forth interactions between courts and governments over the treatment of rights through limitations and derogation clauses, may lead to increased acceptance of more complex and dialogic remedial processes that require the government to propose remedial plans that achieve compliance with the constitution.20

3.6 The Interdependence of Domestic and International Law

The received remedial tradition is decidedly dualist in its contrast between coercive and monological legal remedies at domestic law and more political and dialogic remedies at international law. Much recent experience with rights, however, challenges this sharp dualism and suggests increased interdependence of domestic and international law. Countries and in some cases individuals have increased access to regional and international bodies to adjudicate rights claims after they have exhausted domestic remedies. Many domestic courts voluntarily take note of international standards. Domestic derogations of rights may result in international adjudication.21

International and regional rights adjudicators often call on countries to take steps to comply with the rights standards and to report back on what they have done.22 Dialogic remedies in both domestic and international law attempt to persuade governments to implement norms. They recognise that there are a range of legitimate responses open to governments and much can be gained by allowing governments to select the most appropriate response. Dialogic remedies aim to promote healthy partnerships between courts and governments23 and they are often concerned with producing systemic reforms to prevent violations in the future.

4. REMEDIES FOR VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

4.1 Declarations and Recommendations

Domestic courts and international bodies that are enforcing socio-economic rights will often be concerned about ensuring compliance with such norms in the future and with limits on their institutional competence in crafting remedies to provide benefits and programs. Consequently, they may often find declarations of rights and recommendations to governments to be appropriate remedies at least to start the process of compliance. Declarations and recommendations both rely on the moral suasion of the judicial body as opposed to its coercive powers and they both contemplate dialogue between the adjudicator and the government about the implementation of the right.

In Lansman v. Finland,24 the United Nations Human Rights Committee warned that any future mining might violate the right of the Sami to culture under Article 27 and recommended consultation with the Aboriginal people. Courts in Canada have also recommended consultation with the affected groups as a way of avoiding violation of

22 The Chayeses argue that 'the dynamics of dialogue and accountability are central' to the managerial approach of international law to achieving compliance. 'States are given ample opportunity to explain and justify their conduct. The reasons advanced to excuse noncompliant conduct point to avenues for improvement and correction. The state concerned can hardly avoid undertaking to act along the indicated lines. As the review is reiterated over time, these promises of improvement contain increasingly concrete, detailed and measurable undertakings'. Chayes and Chayes, The New Sovereignty (n.4 above), at p. 230.
23 Chief Justice McLachlin has also observed that the Canadian approach to remedies may have started a 'tradition of cooperation instead of conflict, which, if we can follow it, promises a more harmonious relationship between the judiciary and other branches of government than that which has historically prevailed in the United States'. Beverly McLachlin 'The Charter: A New Role for the Judiciary?', Alberta Law Review, Vol. 29 (1991), pp. 540–559, at 553.
Aboriginal rights. In The International Commission of Jurists v. Portugal, the European Committee of Social Rights made findings that child labour laws should be amended and the number of labour inspectors increased in order to remedy a violation of rights against child labour under the European Social Charter. In Autism-Europe v. France, the same committee indicated that insufficient educational places had been made available for persons with autism and stressed the importance of ‘practical action to give full effect’ to the rights. Judicial bodies that use declarations will find themselves dependent on the legislative and executive branches of government to provide remedies for socio-economic rights.

Courts that appreciate the role of other institutions in responding to and implementing their judgments may be more inclined to rely on general and non-coercive remedies than those who see their judgments as the final act of justice. General declarations as opposed to detailed injunctions have emerged as the preferred remedy for enforcing the Canadian Charter. In a 1997 case involving the equality rights of people who are deaf to receive sign language interpretation in hospitals, the Supreme Court stated that a ‘declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished’. Declarations proceed on the assumption that governments will take prompt and good faith steps to comply with the court’s declaration of constitutional entitlement in a manner not entirely different from the international law principle of good faith implementation of treaties. General declarations contemplate a need for other institutions to discuss and internalise constitutional norms.

The limits of declaratory relief have been exposed in another Canadian case involving the practice of customs officials in seizing material imported by a gay and lesbian bookstore. The majority of the Supreme Court relied upon a declaration that the authorities had breached freedom of expression and equality rights in the past by unfairly targeting imports destined for the bookstore. After the Court’s declaration, the bookstore had to commence new litigation because of its continued dissatisfaction with its treatment by customs officials. Justice Iacobucci in his dissent in the first case anticipated this shortcoming of declaratory relief. He stated that ‘declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government’. At the same time, he added that ‘declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance’. He stressed that declarations will be inadequate and place an unfair burden on successful litigants in cases of grave systemic problems and when administrators ‘have proven themselves unworthy of trust’. The new litigation that had to be started by the small gay and lesbian bookstore has now been thwarted by a decision not to award the litigant advance costs in order to finance the litigation.

4.2 Injunctions and Retention of Supervisory Jurisdiction

An important backstop for declarations is the availability of injunctive relief and the retention of supervisory jurisdiction by courts. Such injunctions represent the more forceful remedial response that should be used in cases where softer declaratory relief is not appropriate, as discussed in the preceding sub-section. Declarations can work in cases in which governments have been inattentive to rights, but the stronger relief of injunctions accompanied with judicial retention of supervisory jurisdiction may be appropriate in those cases where governments are either

unwilling or simply incompetent to provide socio-economic rights.32

Courts in both India and the United States have ordered detailed injunctions in a variety of cases. In the United States, such orders have been made with respect to school desegregation and conditions of confinement in custodial institutions while in India they have been made with respect to child labour and conditions of confinement. A judge of the Supreme Court of India has explained that in such cases 'the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for...moulding relief and - this is important - also supervising the implementation thereof'.33

After reviewing comparative and international law,34 the South African Constitutional Court affirmed the ability of courts to order mandatory injunctions and to retain supervisory jurisdiction in order to enforce socio-economic rights in that country's constitution. It rejected the argument that courts were limited to declaratory relief on the basis that: 'Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure effective relief is granted....Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction'.35 At the same time, the Court stressed that due regard must be paid to the roles of the legislature and the executive in a democracy. Although the government must comply with the constitution and the courts must ensure that it complies, it will often be appropriate to leave the government some margin of flexibility to select the exact means to comply with the constitution. In this case, the Court declared the existing policy with respect to drugs to prevent mother to child HIV transmission to be unconstitutional and ordered that the government, without delay, should permit and facilitate the use of such drugs, as well as testing and counselling to determine when the drug was necessary. The Court added that its orders did not 'preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV'.36 The Court did not require the government to report back to the court about the steps taken to comply with its declarations and orders, or even to announce such plans publicly. In many cases that require injunctive relief, such reporting back requirements will often be crucial in ensuring and monitoring compliance.37

A year after the above South African case, the Supreme Court of Canada upheld the discretion of a trial judge to order that minority language schools be built by certain times and to retain supervisory jurisdiction so that the government would report back on its progress after years of delay in complying with minority language education rights.38 Following the experience with complex public law structural injunctions in the United States, the trial judge retained jurisdiction in part to provide a forum for the parties to negotiate out the complexities of the remedy and to respond to unanticipated circumstances. The procedure allowed for the possibility of the exercise of some moral suasion by the judge and modification of the order. The Supreme Court, however, only upheld the trial judge's remedy in a closely split 5:4 decision with the four judges in the minority basing their dissent on the corrective understanding of the judge's remedial role as discussed in the first part of this chapter. The minority rejected the idea that the judge could exercise a 'suasive' function or 'hold the government's feet to the fire' by requiring progress reports on the steps taken to comply with the court's judgment.39 The minority operated on the assumption that judges act in an illegitimate and 'political' fashion if they engage in anything but the articulation and execution of legally enforceable commands, if need be, by

33 Sheela Barse v. Union of India (n.17 above), at p. 2215.
36 Ibid., para. 135.
37 Roach and Budlender, 'Mandatory Relief' (n. 32 above), at pp. 333-334.
39 Ibid., paras. 127-128.
holding the government in contempt of court. They also expressed concerns that the trial judge would exceed his institutional role by descending into the administrative details of providing education. The majority of the Court, however, deferred to the trial judge’s exercise of remedial discretion and stressed the need for effective remedies without undue delay.

4.3 Revisions of Laws and Suspended or Delayed Declarations of Invalidity

Courts in a number of jurisdictions have revised laws in order to make them constitutional. The German courts have been particularly active in this regard, but courts in both South Africa and Canada have also revised laws. For example, the Constitutional Court of South Africa has read in judicial supervision to ensure fairness and compliance with the constitution in the forced sale of property.\(^{40}\) The Supreme Court of Canada has extended benefits by severing or striking down part of a law that restricted the benefits.\(^{41}\) Even a traditional negative remedy such as striking down parts of a law can have the functional effect of extending state benefits.

The Supreme Court of Canada subsequently reasoned that the scope of the courts’ remedial powers should not depend on the way that legislation is drafted and affirmed the ability of courts to revise laws by reading in words to statutes to cure constitutional defects. In part because of concerns about the separation of powers, this reading or revision power is only used in cases where it is clear that both the purposes of the legislation and of the constitution support a relatively precise judicial revision of the law. In cases where these factors are not clear, the courts in both South Africa and Canada will use a suspended or delayed declaration of invalidity that gives the legislature an opportunity to enact new legislation before the unconstitutional legislation is struck down.\(^{42}\)

A delayed or suspended declaration of invalidity might be appropriate in a case such as Taylor \(v. \ United Kingdom\)\(^{43}\) in which the European Court of Justice found gender discrimination in the provision of winter fuel benefits. An immediate declaration that the benefits were invalid would have regressive effects. Indeed, the Supreme Court of Canada has labelled a lower court’s striking out of benefits provided to single mothers on the basis of gender discrimination as ‘equality with a vengeance’ and expressed the view that as it is consistent with the larger purposes of rights protection, a delayed declaration of invalidity was the appropriate remedy in order to ensure that the vulnerable groups would continue to receive benefits from the state.\(^{44}\) Such a remedy is not without its risks, however, as the legislature responded to the courts decision both by extending the period of parental leave to men but also by reducing the weeks of paid leave available. Delayed declarations of invalidity whether rendered by domestic courts or international bodies must be accompanied by effective lobbying and engagement with legislatures.

Although delay may be necessary in some cases and has the potential to allow for consultation with those affected by the remedy,\(^{45}\) it is not without problems. Delay allows an unconstitutional state of affairs to persist. This may be justified in some cases where immediate compliance with the right is truly impossible. In such cases, it may be preferable for courts to acknowledge and manage delay than to ignore it or allow concerns about delay to contract its interpretation of the right to question. Tolerating and managing delay may be a better alternative than simply refusing to recognise a right because of judicial concerns about enforcement.

Nevertheless, there is a danger that courts could become too willing to accept delay and incrementalism, particularly in the context of socio-economic rights. In all cases, courts should address not only whether delay is truly necessary, but also the position of those whose rights might be infringed during the period of court sanctioned delay. The court that issues a delayed remedy should retain jurisdiction to hear claims that emergency or interim remedies should be granted.

\(^{40}\) Jafuta \(v. \) Van Rooyen CCT 74/2003 (CC), at paras. 63–64.
\(^{41}\) Tetreault-Gadoury \(v. \) Canada (1991) 2 SCR 22.
\(^{42}\) Schachter \(v. \) Canada (n. 11 above).
\(^{43}\) Case 382.98.
\(^{44}\) Schachter \(v. \) Canada (n. 11 above).
\(^{45}\) Corbière \(v. \) Canada (1999) 2 SCR 203, at paras. 116–117 per L’Heureux-Dube J.
to prevent irreparable harm during the period of the court-ordered delay. Such requests for remedies could be decided under the same tests that apply to interim relief to be discussed in the next section. A willingness to grant interim remedies could help ensure that courts do not turn a blind eye to emergencies and hardships that emerge during the period of delay.

4.4 Interim Remedies

An important issue in the litigation of socio-economic rights is the respective emphasis placed on relief for individuals and the development of policies to achieve more systemic relief. In the *Grootboom* housing rights case, the South African Constitutional Court emphasised systemic relief over individual relief by stressing that a housing policy must be developed and not that any particular individual be able to obtain a court order for housing. Such a remedial approach may stimulate government to develop a comprehensive program, but it can also leave individual litigants without an immediate and tangible remedy. It may play into the remedial dichotomies discussed in the first part of this chapter and suggest that socio-economic rights will be enforced in a more contingent and political manner than more traditional negative rights.

One possible way to combine individual and systemic relief is to obtain individual relief on an interlocutory or emergency basis while seeking more systemic relief after a trial on the merits. In some eviction cases in particular, courts might be persuaded to preserve the status quo and prevent irreparable damage by stopping the eviction on an interim basis while the ultimate relief after trial might be to develop an appropriate housing program. Interim remedies may be one way the courts can enforce minimum core obligations even while not formally recognising such requirements. One observer has noted that in social action litigation in India, ‘relief has been offered very often by way of interim orders. As interim orders are given before any preliminary examination of the merits of the case, they have been qualified as ‘remedies without rights’. The reasons behind the frequent use of interim orders can be found in the urgent character of many cases, and in the ongoing nature of many violations of human rights. Interim remedies are also at times available from regional and international bodies.

4.5 Compensation and Restitution

The earlier discussion suggests that whether by the use of declaratory, injunctive or interim relief or through the use of delayed declarations of invalidity, the emphasis in many socio-economic cases in both domestic and international law will often be on securing compliance in the future. As suggested in the first part of this chapter, compensation plays a central role in the remedial theory of corrective justice and plays a much less significant role in newer theories of public law litigation. Nevertheless, compensation and restitution may be appropriate in some socio-economic cases and may also be a means to challenge the remedial dichotomies discussed earlier in this chapter.

In a series of cases involving prison conditions in violation of UN minimum standards, the UN Human Rights Committee urged compensation for a person who was without food for several days. Interestingly, however, the Committee, consistent with public law models, also urged that steps be taken to ensure that similar violations do not occur in the future. A similar dualistic approach aimed at compensation for past violations but also steps to ensure compliance in the future was taken by the African Commission on Human Rights in *SERAC and CESR v. Nigeria*. Most adjudicators that have ordered compensation in the socio-economic context have at the same time devised remedies designed to ensure compliance with such rights in the future.

In many socio-economic cases, compensation will symbolise the suffering of those individuals before the court but additional remedies will be


47 See Sandra Liebenberg in this volume for further discussion of minimum core obligations.


50 No. 155/96.
necessary to reform governments and ensure greater compliance in the future. In one forced eviction case, the European Court of Human Rights has awarded a substantial sum of 15,000 euros for non-pecuniary damages. Such awards can help make socio-economic rights meaningful and counter concerns that they are second-class rights in relation to political and civil rights. Nevertheless, redress of past wrongs is not sufficient to enforce socio-economic rights. There is a danger that governments may pay damage awards in individual cases but not engage in reforms that will prevent future violations and ensure justice for people not before the court.

A combination of restitution and compensation has some potential both to redress past wrongs and to provide future compliance with socio-economic rights. The Constitutional Court of South Africa has upheld a creative use of a judicial order that the State compensate a landowner whose lands were appropriated by homeless people. The Court held that compensation in this case would be an effective remedy both for the landowner and for those homeless people who could remain on his land until the state provided alternative land. Such a remedy is not incompatible with ongoing systemic reforms enforced, if need be, by injunctions and the retention of supervisory jurisdiction. In another case, the Constitutional Court stressed the need for courts to seek a just and equitable solution on the facts of each particular case in reconciling property rights with housing rights. It allowed a small number of homeless people to remain on land they had occupied for eight years in light of the failure of the State to adequately consult with the people and explore all reasonable alternatives to eviction.

4.6 Two-Track Remedial Strategies

There is much to be said for two-track remedial strategies that combine more immediate relief for successful litigants with longer-term processes designed to achieve systemic reform for both the litigants and similar groups. The Inter-American Court of Human Rights has used promising two-track strategies in indigenous rights cases. In one case, it issued an immediate order that the State not infringe or allow third parties to infringe indigenous land rights while also allowing a fifteen-month period for the demarcation and titling of indigenous lands with community participation and in accordance with the customary law of the indigenous community. In another case, it ordered an immediate interim remedy to ensure adequate living conditions while also issuing a longer term relocation remedy for an indigenous community.

Two-track remedial strategies challenge many of the remedial dichotomies examined in this chapter. They allow immediate, individual and interim remedies to be combined with group-based and systemic remedies that often require the management of delay and may allow for participation by the affected interests. They allow a court to order corrective and preventive justice for litigants while also recognising that systemic reform requires a longer and more dialogic process of engagement with the affected interests and the retention of supervisory jurisdiction by either domestic, regional and/or international adjudicators. They combine some of the traditional approaches of domestic courts in insisting on a close connection between right and remedy in order to correct rights violations in the past with the remedial approach long taken by international adjudicators in requiring States to report back on the steps that they have taken to ensure compliance in the future. Two-track remedies combine the corrective promise of the common law of compensation and restitution with the more complex and dialogic methods of equity in ensuring future compliance with the constitution. They also underline that traditional remedies such as compensation and interim and preventive injunctions can in some cases help advance goals of a more equitable distribution of resources provided they are not the exclusive remedies employed.

51 Connors v. United Kingdom (May 27, 2004), at paras. 114–115.
54 Port Elizabeth v. Various Occupiers, 2004 (12) BCLR 1268 (CC).
5. CONCLUSION

An oversimplified understanding of the remedies for civil and political rights as simple corrective remedies that have no distributive effects is a barrier to effective remedies for socio-economic rights. Many traditional political and civil rights require complex and dialogic relief with distributional implications to be effective. Once this is recognised then the remedial process that is required to enforce socio-economic rights will appear much less anomalous, albeit no less complex. The dialogic turn in remedies opens up space for a less dichotomous process for enforcing all rights and for greater integration of the processes of domestic, regional and international enforcement of rights.

Socio-economic rights both in domestic and international law will frequently be enforced by recommendations, declarations and calls by adjudicators on legislators to revise laws. A common assumption behind such dialogic remedies is that governments are able and willing to act promptly to comply with the court’s rulings. Dialogic remedies create space for continued governmental and legislative policy-making without purporting to mandate either the details of the policy or the processes that will be used to formulate those policies. In many ways, these remedies are based on a faith and trust that governments will do the right thing. At the same time, there are concerns about the effectiveness of such soft forms of relief and it will be important for courts to be able to order injunctions and maintain supervisory jurisdiction in cases where declarations will not suffice.

Double standards that treat socio-economic rights as second class, even if rejected at the rights stage, could resurface in the remedial decisions of courts. The challenge is to ensure effective remedies for all rights. As stated by the United Nations Committee on Economic, Social and Cultural Rights in its ninth comment:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.\(^{57}\)

To the end of ensuring effective, just and equitable remedies, courts in Canada, India, South Africa and the United States have all made clear that courts can issue injunctions against governments and exercise continued supervisory jurisdiction to ensure that governments comply with the constitution. To be sure, such remedies will not always be appropriate, but it is important that they are available.

A final challenge is to strike the right balance between individual and systemic relief, remedies that attempt to repair the harms of past violations and remedies that aim to achieve compliance with the constitution in the future. This can be done by combining both systemic and individual relief; by creative combinations of protecting people from evictions while compensating property owners, and by two-track remedial strategies in which judges order interim and immediate remedies while also providing for more systemic reforms that cannot be achieved immediately. Individual litigants without food, medicines and shelter and indigenous people deprived of their land should not continue to suffer irreparable harm and immediate remedies should be ordered to prevent irreparable harm to successful litigants and to provide some measure of compensation for past violations. At the same time, however, a more incremental, dialogic and systemic remedial approach will also be required to achieve fuller compliance with basic and important social, economic and cultural rights for all persons.


Reprinted with Permission.

© Cambridge University Press 2008

Website address for the book: