

Enforcing socio-economic rights as individual rights

The role of corrective and distributive forms of justice in determining “appropriate relief”

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Different notions of justice influence the remedies that courts grant in socio-economic rights litigation. The two theories of justice discussed here derive from the philosophies of corrective and distributive forms of justice.

Corrective justice demands that victims be put in the position they would have been in but for the violation of their rights. Distributive justice, on the other hand, is based on a recognition of the constraints of corrective justice. Unlike corrective justice, distributive justice focuses not solely on the interests of the victim, but on society at large.

These theories of justice influence a host of other factors such as the relationship between rights and remedies, the form and procedures of litigation, and the manner of implementing remedies. They also influence the liability rules adopted by the courts to determine wrongfulness and whether the plaintiff has suffered as a result.

Defining corrective justice and distributive justice

Corrective justice

The corrective justice theory is guided by the vision of libertarianism, which is based on the view that each person has the right to live his/her life in any way he/she chooses, so long as that individual respects the rights of others. The government exists only to protect people from the

use of force by others. From this perspective, individual freedom cannot be sacrificed for the sake of the common good (Sandel, 1998: 16; Rawls, 1999: 3). The primary function of the court is therefore the resolution of disputes in order to achieve fair results from human interaction and to maintain individual autonomy.

Libertarians define human rights in a negative manner: all we need are rights that guarantee non-interference from others in our enterprise of seeking autonomy. In this philosophy, litigation is viewed as a vehicle to restore the autonomy of those whose rights have been violated. Thus those who believe in the philosophy of corrective justice recognise the fact that stopping legal wrongs completely is impossible. However, they perceive the law as a tool for restoring those who have been wronged to the position they would have been in but for the wrong. Indeed, corrective justice, in Aristotle’s definition, “plays a rectifying role in a transaction

between man and man” (Aristotle, 1908: V:2).

In modern private law, corrective justice is most prominent in tort (delict) law, but applies also in property and contract law. When parties enter into a contract, it is assumed that they begin as equals with corresponding rights and duties. Omission by one party to discharge his/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 to restore that equality. 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 had the wrong not been committed.

It is not enough, however, to prove that the victim’s status has been altered to claim a remedy under the corrective justice theory; there must be proof that the alteration has resulted from the defendant’s wrong. Additionally, a judge’s discretion is limited to those remedies that, as much as possible, restore victims to their previous position.

Distributive justice focuses on society at large.

As it focuses on the victim at hand, litigation based on corrective justice is generally not suited to resolving structural or systemic violations (violations that occur and endure in a sustained manner as part of an institution's behaviour) arising from organisational behaviour. However, this does not mean that it is completely irrelevant to redressing violations resulting from such 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.

Distributive justice

Distributive justice is concerned with the distribution of benefits and burdens among members of a given group. The benefits may accrue to such members either simply by virtue of their membership of the group or as a result of some entitlement.

The notion of distributive justice is supported by the philosophy of utilitarianism, which is based on the belief in an individual's well-being, and also lays emphasis on the common good of society and the well-being of all its members. An act is just only if it maximises the well-being of everyone else.

From a utilitarian perspective, the law and the courts have very important roles to play in the enterprise of realising social cooperation. According to this view, courts have to consider interests other than those of the parties before them.

Unlike bilateral corrective justice, distributive justice is multilateral in that it has community-wide implications. As a result, the court in a given case, far from limiting its remedy to addressing the wrong between the parties before it, also focuses on what has been described as collateral interests (Cooper-Stephenson, 1991: 19). This arises from the recognition that not all interested persons may be party to a suit, yet their interests may be affected by the outcome of that suit.

Distributive justice is also based on an acknowledgement that it is not possible in all cases to put the victim of a wrong in the position he/she would have been in but for the violation. It is not always possible to identify discrete wrongs and the wrongdoer with precision. Harm may be inflicted on groups of people, not only on an individual victim, and may arise from conduct that cannot be associated, in liability terms, with a specific defendant. Where the state is the duty bearer, 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 the government is guilty, the court can, in some circumstances, dedicate its efforts to getting solutions that may do away with the harm.

Rather than being guided by strict rules of procedure and 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. For instance, courts are not bound by the requirement that

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equitable remedies will only be available where common law remedies are proven to be inadequate.

Because of the necessity to avoid repetition of the same conduct, distributive justice allows remedies to have a future direction and focuses on the needs of the

community as a whole. This should be contrasted with corrective justice, which is backward-looking and focuses on the individual claimant 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. Unlike corrective justice, however, distributive justice will use such past actions as a basis for determining future actions.

It insists on a full correction of the violation "absent special circumstances". "Special circumstances" are circumstances which may impact on the remedy, such as the costs associated with the implementation of the remedy.

It should be noted further that under distributive justice, the court focuses not only on the nature of the injury but also on the distinctive character of the parties in the court case. It also focuses on the character of

persons who, though not parties to the case, would be affected by its results. For instance, though they may inflict the same kind of harm, violations perpetrated by private individuals and those perpetrated by the government are generally of a different nature. The reasons leading to such violations are usually also quite different, and so are the benefits that may be obtained by the violator.

The nature of the remedies needed to deter the state may be different from those sufficient to prevent private violations. For example, damages may be an effective remedy against a private wrongdoer but not against the government, which would pay them from public coffers.

South Africa: Distributive or corrective justice?

The South African courts have sought to focus their remedies beyond the individual litigant and to grant remedies that advance constitutional rights and extend collective or group benefits. Though vindication and compensation of the victim has been acknowledged as a fundamental objective of constitutional litigation, it is not the only objective that has 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 is a precept that the courts have sought to advance. The courts have also considered the impact of proposed remedies on the defendant and their effect on the relationship between the defendant and the plaintiff.

To protect the constitutional values, the courts have, in some cases, awarded plaintiffs relief in circumstances where they might have not deserved it (see *Police and Prisons Civil Rights Union and Others v Minister of Correctional Services and Others* 2006 (8) BCLR 971 (E)). The Constitutional Court has in other cases leaned towards putting victims of constitutional violations in the position they would have been in had the violation not occurred. In the same cases, however, the interests of the community and the interests of the defendant too have featured in what the court has called “a balancing process” (see, for instance, *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC) [Hoffman]).

Though the South African Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions. In terms of social justice, the Constitution is premised on the need to realise an orderly and fair redistribution of resources. The Constitution in this respect demonstrates a commitment to the establishment of a society based on social justice, among other things.

In addition to protecting individual rights, the Constitution guarantees a number of socio-economic rights directly linked to social justice. While socio-economic rights have elements that are capable of extending individual entitlements, they also

include entitlements that can only be enjoyed by a group. This is especially true of the positive elements of these rights which compel the government to take measures to realise them. Obligations of this nature require the government to provide goods and services for the benefit of all members of society or groups of people.

It is especially in respect of socio-economic rights that the transformative nature of the

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Constitution has been underscored. The Constitution is perceived as, among other things, an instrument to transform South Africa's society from one based on socio-economic deprivation to one based on an equal distribution of resources (Klare, 1998: 147). The provision

of services, which was racially skewed under the apartheid system, is therefore considered to be central to the transformative project of the Constitution (Langa, 2006: 351).

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. In the Constitution itself, most socio-economic rights are crafted as individual rights – “everyone has the right to ...” and “every child has the right to ...”. Nonetheless, the question remains whether the prevailing social and economic context allows for the

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

It is only after appreciating the historical, social, political and economic settings that one can understand the challenges of enforcing socio-economic rights as conferring individual rather than collective benefits (De Vos, 2001: 262).

In South Africa, socio-economic rights assume their importance in a context characterised not only by racially institutionalised poverty but also by a commitment to alleviate or eradicate such poverty. The majority of South Africans live in extreme poverty, a legacy of apartheid. The available resources are not adequate, however, to facilitate the immediate provision of socio-economic goods and services to everyone on demand.

Holistic approaches to providing socio-economic goods and services that focus beyond the individual are the most desirable in the circumstances. 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 (Roach, 2005: 111).

The realisation of socio-economic rights in contexts of scarce resources requires careful redistribution of the resources to benefit all in need. It is at this stage that the notion of distributive justice becomes relevant. Courts

have to focus beyond the needs of the individual and consider the interests of society or groups of people. Individual rights therefore have to be balanced against collective welfare. 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" (De Vos, 2001: 259-60, commenting on the case *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC)). In this case, the Constitutional Court deferred to the hospital to decide how best to utilise scarce medical resources in a distributive manner without prioritising the needs of an individual at the expense of others.

It is on the basis of this approach that in *Government of Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (Grootboom), the Constitutional Court rejected the submission that the socio-economic rights provisions in the Constitution conferred individual entitlements on demand. It

rejected the submission that the Constitution had to be interpreted as establishing a minimum core of goods and services claimable individually on demand. It also dismissed the argument that section 28 of the Constitution guaranteed

an unqualified right on the part of every child to have access to basic nutrition, shelter and health services.

Instead, the Constitutional Court chose to locate the claims of all individuals, adults and children, within the broader context of society's needs. The Court held that all that the state is obligated to do is to put in place a reasonable programme to achieve the progressive realisation of socio-economic rights. The programme must be inclusive of the needs of all people and must address short-, medium- and long-term needs.

The Constitution also contains the underlying values of South Africa's new-found democracy. Indeed, courts are constitutionally obliged to promote these values whenever interpreting the Bill of Rights. While 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 (see the use of the concept of *ubuntu* in *S v Makwanyane* 1995 (3) SA 391 (CC)).

Distributive justice-based remedies

As argued above, the Constitutional Court's use of the ethos of distributive justice is reflected in its approach to granting remedies for human rights violations. The Constitution gives courts very wide remedial powers to "grant appropriate relief, including a declaration of

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rights” and to make “any order that is just and equitable” (sections 38 and 172).

It is argued that the definition of an “appropriate, just and equitable remedy” depends on, among other things, the notion of justice favoured by the court. In this respect, the phrase could assume two meanings. It could refer to a remedy that is required by an individual whose rights have been violated. It could also mean a remedy that focuses on all interests implicated in the case and balances these interests against those of the individual plaintiff (Roach, 1994: 3–4).

The Constitutional Court has taken cognisance of the fact that when constitutional rights are violated, though a litigant may have suffered special harm, society as a whole is injured (Hoffman, para 43). If any remedies are to be obtained for such violation, they should be aimed not only at vindicating the victim but also at advancing the interests of society as a whole. 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.

It is on this basis 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 Court has on some occasions

rejected proposed out-of-court settlements between the parties where it was found that they would likely benefit the parties to the case only. In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (Khosa), the Court held that an offer to settle a dispute could not be sanctioned, even if accepted by the other party, if it could not resolve the unconstitutionality of the impugned provisions and the

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impact that they had on the broader group of persons who might qualify for a similar benefit. 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 justice so required (*East Zulu Motors (Pty) v Empangeni/ Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC)).

The Court has observed that the balancing process must be guided by the objective, first, of addressing the wrong occasioned by the infringement of the constitutional right; second, of deterring violations; and third, of making an order that can be complied with (Hoffman, para 45).

In *Dikoko v Mokhatla* 2007(1) BCLR 1 (CC), the Court held that the principal objective of the law was “the restoration of harmonious human and social

relationships where they have been ruptured by an infraction of community norms” (para 68). 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. This is because an award of excessive damages would have implications for free expression, which is the lifeblood of a democratic society. 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.

Conclusion

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 “appropriate, just and equitable” as is suggested by some authors. Instead, one should assess the overall impact of the remedy on the state’s policy or policies touching on the right in issue. One should ask, for instance, whether the state has overhauled its policy to reflect the elements of a reasonable policy as defined by the Constitutional Court.

Taking the example of the Grootboom case, the judgment may not have resulted in tangible goods and services for the Grootboom community. Generally, however, the decision has forced the government to shift its housing programme to cater for the needs of people in intolerable conditions and those threatened with eviction (Budlender, 2004: 41).

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. Whether this policy is being implemented is another issue.

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