Optimisation Through Innovation:

Judicial Exercise of Discretionary Remedial Power to Enforce the State's Positive Human Rights Duties

DPhil Thesis

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Balliol College

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Abstract

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This thesis bridges remedial theory and practice to explore how the judicial exercise of discretionary remedial power can be optimised to enforce the state's positive human rights duties. Recognising both the difficulty and the importance of remedying breaches of the state's positive duties, this thesis advances a constructive project that illuminates not just the risks but also the potential rewards of discretionary remedial power.

Part I develops a theoretical account of the optimal exercise of discretionary remedial power that is attentive to both the challenges and the responsive nature of the judicial task in remedying breaches of the state's positive duties. I argue for a principled exercise of discretionary remedial power that involves the contextualised prioritisation and optimisation of four remedial principles: (1) Effective Relief, (2) Systemic Compliance, (3) Institutional Responsiveness, and (4) Institutional Complementarity. Remedial decision-making should not only assign a conditional order of preference to the remedial principles when they are in tension, but also optimise all four principles as far as possible in any particular case.

Part II uses a case study method to illuminate how this imperative of optimisation can be achieved through remedial innovation. Using the evaluative framework developed in Part I of the thesis, I trace the trajectory of remedial development in two case studies: the litigation on education financing run by the Campaign for Fiscal Equity in New York State, and the education litigation on school infrastructure, furniture and teachers run by the Legal Resources Centre in South Africa. In drawing out the potential of the featured remedial innovations for addressing the distinctive remedial challenges posed by positive duties, my thesis demonstrates how the exercise of discretionary remedial power can be optimised through innovation.

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Table of Abbreviations and Short Forms

BIP	Brookings Institution Press
CESCR	Committee on Economic, Social and Cultural Rights
CFE	Campaign for Fiscal Equity
CUP	Cambridge University Press
DBE	Department of Basic Education
ECDOE	Eastern Cape Department of Education
GG	Government Gazette
GN	Government Notice
HEP	Harvard Education Press
HIP	Hoover Institution Press
HUP	Harvard University Press
ICESCR	International Covenant on Economic, Social and Cultural Rights
LRC	Legal Resources Centre
NAACP	National Association for the Advancement of Coloured People
NAP	National Academies Press
NNSSF	National Norms and Standards for School Funding
NYSER	New Yorkers for Students' Educational Rights
OUP	Oxford University Press
PED	Provincial Education Department
PULP	Pretoria University Law Press
PUP	Princeton University Press
SADTU	South African Democratic Teachers' Union
SED	State Education Department
SGB	School Governing Body
SUNY	State University of New York Press
SUP	Stanford University Press
TUP	Temple University Press
UCP	University of Chicago Press
UMP	University of Michigan Press
UNGA	United Nations General Assembly
YUP	Yale University Press

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CHAPTER ONE

INTRODUCTION

[I]t is necessary to test or 'discipline' constitutional theory against remedial practices—and a theory inattentive to the details of remedies is a theory of fiction.[1]

I. Situating the Thesis

A. The Remedial Lens of Positive Duties

Recent academic literature has unsettled the traditional distinction between socio-economic rights and civil and political rights, such that there is now growing consensus that all human rights are indivisible, interdependent and interrelated.[2] A significant contribution to this body of literature has been the insight that *all* rights give rise to a range of duties, both positive and negative.[3] The upshot of this more nuanced conception is that 'the complete fulfilment of each kind of right involves the performance of multiple kinds of duties'.[4] This approach encourages greater clarity as to both the nature of the right and the nature of the duty concerned, in keeping with Hohfeld's fundamental insight that 'right' and 'duty' are correlatives that describe two

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[1] Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14 International Journal of Constitutional Law 584, 600–601 (footnotes omitted).

[2] Vienna Declaration and Programme of Action UNGA Res A/RES/48/121 (1993).

[3] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (PUP 1996); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 54–59.

[4] Shue (n 3) 51.

sides of one legal relation.[5] As O'Rourke remarks in his Hohfeldian analysis of constitutional law, rights and duties are 'different vantage points upon a single relationship'.[6] The 'vantage point' taken in this thesis is on *duties* rather than rights. Moreover, this 'point of observation'[7] is narrowed to focus on the legal relation between human rights and *positive* duties because of the distinctive kinds of remedial challenges that are generated by their breach.

Positive duties pose remedial challenges that do not typically arise in relation to the enforcement of negative duties of restraint. The forward-looking, resource-intensive dimension of positive duties frequently requires a programmatic implementation of systemic relief rather than a 'one-shot' remedy. This is because systemic relief does not come ready-made, but needs to be ascertained and even revised as implementation unfolds. Remedial formulation is therefore seldom a discrete activity but rather absorbs the court in an extended remedial *process*.[8] Importantly, these remedial challenges generated by positive duties are not limited to progressively realisable rights[9] or socio-economic rights.[10] They are instead best understood as being *paradigmatic* to remedies enforcing the state's positive duties in human rights.

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[5] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, YUP 1919); Allen Thomas O'Rourke, 'Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law' (2009) 61 South Carolina Law Review 141, 150.

[6] O'Rourke (n 5) 169–170.

[7] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana 1960) 85.

[8] The term 'remedial process' is used in this thesis to reflect this continuity between remedy and enforcement, and to capture the lengthening and diversification of the court's involvement in remedying breaches of the state's positive duties. See Chapter Two, Section II.

[9] This is demonstrated by my two case studies on the immediately realisable right to education.

[10] See, for example, the judicial enforcement of the state's positive duty to fulfil prisoners' right to vote in South Africa: *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280 (CC).

B. The Priority of Remedies

The distinctive remedial challenges posed by positive duties constitute the central 'puzzle' with which my thesis grapples. More specifically, my enquiry explores how the discretionary nature of constitutional remedial power enables courts to navigate these remedial challenges. In the context of positive duties, there is often a range of remedial possibilities for fulfilling the right at stake rather than one self-evident remedy that flows ineluctably from the breach. The discretionary nature of remedial decision-making is therefore underscored in the context of positive duties. Recognising both the difficulty and the importance of remedying breaches of positive duties, my thesis seeks to answer this question: *How can courts optimise their exercise of discretionary remedial power when enforcing the state's positive human rights duties?*

By virtue of my focus on the discretionary nature of constitutional remedial power, the thesis draws attention to the priority of remedies in two senses. Firstly, it treats remedies as needing special attention. In both constitutional jurisprudence and academic literature, remedies are seldom accorded equal time and consideration as rights.[11] Indeed, judgments frequently devote dozens of pages to establishing the breach of a right—setting out the facts of the case, discerning the legal questions, and carefully reasoning through the issues to justify the decision reached. The remedy, by contrast, often reads as a postscript or afterthought, tagged onto the judgment in a few lines or perhaps a few

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[11] Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (YUP 1983) 28; Grant Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991) 107; John Sopinka, 'Constitutional Remedies and Their Limitations' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991) 258; Beverley McLachlin, 'Rights and Remedies - Remarks' in Kent Roach and Robert J Sharpe (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice 2010) 21. Levinson observes that while Lon Fuller's decision to put the remedies chapter of his contracts casebook first was considered clever, the same move in a constitutional casebook would more likely be considered blasphemous. See Daryl J Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 Columbia Law Review 857, 931 fn 317.

paragraphs. However, the discretionary nature of remedial power means that the choice of remedy cannot be judged as unequivocally 'correct' or 'incorrect' but should rather be evaluated as a 'sound' or 'less sound' exercise of remedial discretion.[12] My thesis accordingly emphasises the priority of remedies in the context of judicial reasoning, arguing for the principled exercise of discretion in remedial decision-making.

Secondly, the thesis draws attention to the ways in which discretion can allow remedial concerns to precede, or be placed prior to, a comprehensive understanding of a right. The discretionary nature of remedial power means that rights and remedies cannot be neatly severed or conceptually sealed off from each other. My thesis emphasises how remedial discretion mediates the relationship between rights and remedies, making it 'inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.'[13] Remedial discretion therefore poses a risk of 'under-realising' a right by defining it in such a way as to prevent undesirable remedial implications from materialising. This risk is particularly acute in respect of positive duties, given their distinctive remedial challenges, and my thesis therefore affirms the importance of optimal remedies for the full realisation of rights. Remedies are not merely the 'handmaidens of rights' but rather play a formative role in influencing both the content and value of rights.[14] As Beverley McLachlin has eloquently put it, rights and remedies are 'interwoven in the single fabric we call justice'.[15]

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[12] HLA Hart, 'Discretion' (2013) 127 Harvard Law Review 652, 664.

[13] Paul Gerwitz, 'Remedies and Resistance' (1983) 92 Yale Law Journal 585, 678–679.

[14] Michael Bishop, 'Remedies', *Constitutional Law of South Africa*, vol 1 (2nd edn, Juta 2014) 7 fn 2.

[15] McLachlin (n 11) 23.

C. The Scope and Aim of the Project

Much has been written about the implications of human rights review for the judicial role, as disagreement about the proper role for the court lies at the heart of the debate about the legitimacy and desirability of entrenched human rights. Chapter Three offers a more detailed account of the contours of my contribution to this debate, but it is necessary here to identify the key operating assumptions upon which my argument rests. The boundaries of my enquiry can be marked off with reference to four fundamental distinctions: (1) the enquiry unfolds within the context of *human rights review* rather than the more traditional forms of administrative review; (2) it concerns the exercise of *remedial power* rather than the adjudicative power involved in the prior determination of whether there has been a breach of a right; (3) it gives special attention to the state's *positive duties* to fulfil rights and therefore does not give equal attention to negative duties of restraint; and (4) it offers a normative evaluation of the *exercise* of remedial power, not a justification of the constitutional foundation of the granting of such remedial power.

The scope of the project can be even more tightly drawn by clarifying its central aim. To avoid becoming bogged down in the normative quicksand of whether courts should be given powers to review state (in)action for its compliance with human rights norms, the parameters of this thesis are deliberately set to free up space for an enquiry which takes this debate forward. It proceeds on the basis that, as a matter of descriptive constitutional practice, courts *have been given* a strong constitutional mandate to enforce the state's positive duties and *are equipped* with broad and discretionary remedial power to provide just and equitable relief where the state has failed to fulfil rights. The preoccupation in the literature with constraining and fixing the limits of discretionary remedial power has distracted attention from the equally important question of how best courts can discharge the constitutional mandate that they have in fact been given. The central aim of the project is therefore a *constructive* one—to explore how discretionary remedial power can be exercised in an *optimal* way to ensure rights are fulfilled. Seeking to reclaim a positive role for the court, my research question does not ask how little will suffice to protect rights but rather how much can be achieved within the appropriate exercise of discretionary remedial power.[16] The remedial lens of positive duties enables, even invites, this constructive enquiry as it throws into sharp relief both the *difficulty* and the *importance* of remedying breaches of the state's positive duties.

Given this central aim, the scope of my project is limited by its relevance to particular kinds of courts and constitutional contexts which meet these operating assumptions. Broadly speaking, the enquiry finds application in jurisdictions where (1) a written constitution gives courts a strong mandate to enforce human rights and their correlative positive duties; (2) courts are equipped with broad, discretionary remedial power to provide just and equitable relief where rights are breached; and (3) courts operate within a common law adversarial model in which litigation is traditionally party-controlled while the judge plays a more passive, impartial role and is expected to give reasons for decisions. The project does not attempt a comparative analysis but rather draws on certain 'focus jurisdictions' which closely fit within this generalised model—South Africa, Canada, India and the United States (state courts, in particular). Notwithstanding the significant differences between these jurisdictions, their resemblances are sufficient to serve as valuable settings for my enquiry. Most importantly, courts in these focus jurisdiction are all confronted, as a matter of constitutional practice, with the remedial challenges identified above as being paradigmatic to positive duties. I therefore draw on their respective bodies of

[16] The scope and aim of my constructive project can therefore be clearly distinguished from contributions that respond to concerns about the 'risky enterprise' of judicially enforced human rights. For example, Jeff King argues for incrementalism as a form of judicial restraint to keep the enforcement of social rights 'within safer bounds'. Jeff King, *Judging Social Rights* (CUP 2012) 9.

jurisprudence and academic literature according to the particular strengths of their contribution to answering my research question.

II. Argument and Structure

Due to my two-part research design, my enquiry yields two kinds of answer to my research question. Part I of my thesis lays a theoretical foundation for the optimal exercise of discretionary remedial power, while my case studies in Part II identify specific remedial innovations that hold potential for achieving such optimisation. These two kinds of answers are not merely complementary in offering a theoretical and practical perspective on the same question, but are also integrated in establishing the broader argument that the exercise of discretionary remedial power can be optimised through remedial innovation. The rewards of discretionary remedial power are exemplified through remedial innovation, when courts do not resign themselves to the readily available repertoire of established remedies but rather imagine new remedial possibilities that provide optimal relief for the state's failure to fulfil rights. The innovative remedies featured in Part II are therefore a response to the imperative of optimisation as framed in Part I. To provide a roadmap for reading the thesis, I will briefly outline the progression of this central argument through each chapter.

The theoretical foundation in Part I is built over the course of three chapters. Chapter Two offers conceptual clarity on the relationship between 'Rights, Remedies and Positive Duties'. The first half of the chapter sets up the problem that my thesis addresses by contrasting the range and complexity of remedies for breaches of positive duties with a received remedial paradigm, epitomised by private law, which sits more easily with backward-looking duties of restraint. I accordingly identify the 'paradigm remedial puzzle' posed by positive duties, unpacking the remedial challenges typically involved in (1) ascertaining systemic relief; and (2) promoting accountability for compliance. The second half of the chapter builds on the seminal work of Gerwitz[17] and Levinson[18] to draw out the central role of discretion in mediating the reciprocal relationship between rights and remedies. By bringing these insights to bear on the challenges of enforcing positive duties, I underscore the importance of remedies for the full realisation of rights.

Chapter Three explores the central tension that characterises 'The Exercise of Discretionary Remedial Power' when addressing the remedial challenges posed by positive duties: on the one hand, courts are constrained by the limits of their democratic legitimacy, institutional competence and judicial independence, but on the other hand, they are bound by their constitutional mandate to enforce the state's positive duties, providing just and equitable relief where the state has failed to fulfil rights. I accordingly identify the two risks associated with the discretionary nature of remedial power—the risk of judicial overreaching and the risk of under-realising rights. In navigating this central tension, courts are not walking a judicial tightrope but are instead faced with a range of remedial possibilities within the appropriate scope of their discretionary remedial power. Finally, I develop a typology of discretionary remedial power that sets out the diversity and fluidity of forms that its exercise can take: (1) court-*approved* remedies; (2) court-*facilitated* remedies; (3) court-*prompted* remedies; (4) court-*selected* remedies; (5) court-*introduced* remedies; and (6) court-*imposed* remedies.

As the culmination of Part I, the first answer to my research question is provided by Chapter Four's conceptualisation of 'Remedial Principles as Optimisation Requirements'. The chapter provides an account of how courts should *optimise* their

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[17] Gerwitz (n 13).

[18] Levinson (n 11).

exercise of discretionary remedial power when faced with a range of *appropriate* remedial possibilities for enforcing the state's positive duties. Drawing on Alexy's understanding of principles as 'optimisation requirements',[19] I argue that a sound exercise of remedial discretion should involve the prioritisation and optimisation of four principles: (a) the Principle of Effective Relief; (b) the Principle of Systemic Compliance; (c) the Principle of Institutional Responsiveness; and (d) the Principle of Institutional Complementarity. The best remedy in a particular case will not only reflect the conditional order of preference assigned to the four principles when they are in tension, but also seek to optimise *all* four principles as far as possible. The chapter closes by arguing that this imperative of *optimisation* calls for greater remedial *innovation*.

Part II responds to this call for remedial innovation with two case studies that offer in-depth, contextualised insights into pioneering remedies for breaches of the state's positive duties. Both case studies feature serialised litigation on the right to education and are structured to trace a trajectory of remedial development in which persistent non-compliance serves as a catalyst for remedial innovation. Using the remedial principles developed in Chapter Four as an evaluative framework, I draw out the potential of these remedial mechanisms for overcoming the paradigm remedial puzzle posed by positive duties.

Chapter Five explores the remedial challenges of 'Costing-Out a Sound Basic Education in New York City'. This case study covers the extended litigation run by the Campaign for Fiscal Equity (CFE) challenging the constitutionality of the education financing system in New York State.[20] The disagreements between the trial court and

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[19] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2010) 47.

[20] The serialised litigation played out in three stages in three courts over thirteen years: *Campaign for Fiscal Equity v State of New York* 86 NY2d 307 (NY 1995) (*CFE Ic*); *Campaign for Fiscal Equity v State of New York* 100 NY2d 893 (NY 2003) (*CFE IIc*); *Campaign for Fiscal Equity v State of New York* 8 NY3d 14 (NY 2006) (*CFE IIIc*). At each of the three stages, the case was first heard by the Supreme Court (the trial court), then

split Court of Appeals at each stage of the litigation reflect different weightings accorded to my remedial principles, thus demonstrating the implications of these different prioritisations for remedial decision-making. The serialised progression of litigation also tracks a remedial escalation in which non-compliance prompted the appointment of an independent panel of referees to 'cost-out' the constitutional standard of a 'sound basic education' in budgetary terms. This case study demonstrates how the exercise of discretionary remedial power can be optimised even in the paradigmatically polycentric context of education financing.

Chapter Six explores the remedial challenges of 'Litigating a Legacy of Education Inequality in South Africa'. This case study covers three streams of serialised litigation run by the Legal Resources Centre (LRC) challenging the government's systemic failure to provide adequate infrastructure and basic resources to public schools in the Eastern Cape province of South Africa. Each stream of litigation follows a similar trajectory of remedial experimentation and optimisation, with the remedial plan being refined at each stage of the litigation in response to the remedial challenges that had crystallised during implementation. However, when viewed together as a trilogy, the three streams of litigation also chart a steep learning curve in remedial development, with persistent non-compliance prompting increasingly bold remedial innovations: (1) *Mud Schools*[21] piloted the two-track remedy that served as the basis for structuring relief in each subsequent stream of litigation; (2) *Madzodzo*[22] featured the novel appointment of an independent

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the Appellate Division, before finally reaching the Court of Appeals. My evaluation focuses on the three trial court decisions (what I refer to as *CFE Ia*, *CFE IIa* and *CFE IIIa*) and three Court of Appeals decisions (what I refer to as *CFE Ic*, *CFE IIc* and *CFE IIIc*).

[21] *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* (ECB) unreported case no 504/10. For ease of reference, I call this litigation the '*Mud Schools*' case as it is most commonly known by this name.

[22] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

auditor and the use of supervisory jurisdiction to ameliorate the imposition of strict deadlines for compliance; (3) *Centre for Child Law*[23] resorted to the bold remedial intervention of 'deeming' provisions to compel compliance, culminating in the *Linkside*[24] class action which broke new ground as a way of scaling up systemic relief.

The 'Conclusion' in Chapter Seven draws together the insights generated by Part I and Part II to demonstrate the added value of bridging remedial theory and practice for answering my research question. By integrating the two kinds of answers generated by Part I and Part II, I underscore the overarching argument developed in the thesis, namely that the exercise of discretionary remedial power can be optimised through remedial innovation.

III. Methodology

A. Bridging Remedial Theory and Practice

The two-part structure of the thesis reflects my methodological aim of bridging remedial theory and practice. Remedies 'concretise' rights in the sense that they require courts to respond to social context in a way that gives practical and tangible effect to rights. For this reason, remedial theory needs to be attentive to the practical challenges that courts face when enforcing the state's positive duties. As Leckey has argued, 'it is necessary to test or "discipline" constitutional theory against remedial practices—and a theory inattentive to the details of remedies is a theory of fiction'.[25] At the same time, however,

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[23] *Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG).

[24] *Linkside and Others v Minister for Basic Education and Others* [2015] ZAECGHC 36.

[25] Leckey (n 1) 600–601.

remedial practice waits for no theorist—courts are actively engaged in remedial experimentation and innovation as they are confronted by new cases that bring new remedial challenges. This reality is eloquently captured by Sturm's observation in the United States context that '[t]he remedial process in public law litigation is a practice in search of a theory'.[26] My methodological aim of bridging theory and practice is therefore an important vehicle for achieving the central aim of my thesis as a constructive project: it seeks to advance and enrich remedial theory by considering the remedial challenges and innovations that courts *are in fact* engaged with, as a matter of descriptive constitutional practice. Remedial theory is infused with a pragmatic dimension through detailed, contextualised attention to the practical challenges of enforcing the state's positive duties, while remedial practice receives critical attention through an evaluation of the innovative remedies have been developed to overcome these challenges.

My methodology can be described as a dialectical approach in which a productive or generative relationship between theory and practice is achieved through an iterative research process.[27] The insights of one perspective are allowed to permeate and shape my understanding of the other, in keeping with my contention that remedial theory needs to be cognisant of the practical challenges that courts face when enforcing the state's positive duties. The theoretical account developed in Part I provides a normative framework for evaluating the case studies, but these insights are by no means 'immaculately conceived, in isolation from the contaminating influences' of the case

[26] Susan Sturm, 'A Normative Theory of Public Law Remedies' (1991) 79 Georgetown Law Journal 1355, 1357. 'Public law litigation', a term often used interchangeably with structural or institutional reform litigation, most often involves the enforcement of positive duties and thus resonates strongly with the 'paradigm remedial puzzle' that I develop in Chapter Two, Section II.

[27] My modest account of a dialectical approach simply latches onto the core idea behind the term 'dialectic'. The linguistic derivation from the Greek *dialectike* means conversation or, more literally, reasoning by splitting in two. The concept captures, among other things, ideas of 'connectedness and development', 'a reciprocal relationship between theory and practice' and a 'method of presentation'. See David Leopold, 'Dialectical Approaches' in Marc Stears and David Leopold (eds), *Political Theory: Methods and Approaches* (OUP 2008) 126.

study material but rather the result of an 'open-ended conversation between [the] researcher and her evidence'.[28] The thesis was therefore developed through an iterative process, involving both inductive study and deductive theorising.[29] The constant revisiting of the case study material during my research process—what is referred to in the literature as 'soaking and poking'[30]—helped to refine the theoretical insights developed in Part I. While Part I draws heavily on academic literature and my reasoning is strongly deductive, it is also responsive to the dynamic of remedial practice as portrayed in the case studies. Note that this is different—more dynamic and nuanced—than simply testing a theory *against* practice according to a characteristically scientific inductive method of reasoning. Rather than the wholesale rejection or acceptance of a theory, practical insights serve to modify and refine a theory. This integrated approach to the research process therefore involves a constructive tension between a settled understanding of the law and a receptiveness to emerging signs of novelty and diversity.[31]

B. The Value of Case Study Method

My use of a case study method is central to this dialectical research process which bridges remedial theory and practice, and therefore deserves detailed attention here. Case study research is a prevalent methodology in the social sciences, but takes many different

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[28] John Gerring, *Case Study Research: Principles and Practice* (CUP 2007) 72.

[29] See Alexander George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 269.

[30] ibid 89.

[31] Denis Galligan, 'Legal Theory and Empirical Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 991.

forms and serves a range of purposes. Its core strength, however, lies in the fact that it 'enables exploration, description and attention to the unique and particular.'[32] For this reason, Robert Yin characterises case study method as being particularly well-suited to answering 'how' or 'why' research questions, defining a case study as the investigation of a 'contemporary phenomenon (the "case") in its real-world context, especially when the boundaries between the phenomenon and context may not be clearly evident.'[33] In a similar vein, Kathleen Eisenhardt defines the case study as 'a research strategy which focuses on understanding the dynamics present within single settings.'[34]

Case study research is particularly useful for the kind of evaluative enquiry I undertake in this thesis. Firstly, the in-depth exploration that characterises a case study allows the researcher to capture the complexities of a case in a unique way.[35] My case study method enables the kind of 'thick description' that is sacrificed when doing doctrinal or comparative analysis of a large number of cases. Secondly, case study method allows the researcher to attend fully to the contextual conditions in which the case is embedded, including those that potentially interact with the object of the study.[36] Since courts respond to remedial challenges quite differently across jurisdictions, it is arguably unhelpful to consider their approaches in the abstract, untethered to specific social and legal contexts. My case study analysis therefore looks beyond the four corners of a discrete court order or reported judgment to draw on a range of supplementary court documents and supporting materials. Careful attention is paid to situating the

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[32] Matthew David (ed), *Case Study Research* (Sage 2006) xxxviii.

[33] Robert Yin, *Case Study Research: Design and Methods* (5th edn, Sage 2013) 16.

[34] Kathleen Eisenhardt, 'Building Theories From Case Study Research' in Matthew David (ed), *Case Study Research*, vol 4 (Sage 2006) 300.

[35] Yin (n 33) 220.

[36] ibid.

litigation within its constitutional context and drawing connections to relevant political, economic and historical developments. The evaluation retains a court-focused perspective, but the exercise of discretionary remedial power is contextualised within the strategic choices made by the parties and the broader setting for the litigation. Through this more comprehensive sweep of the material, the case studies generate contextual insights with depth, richness and sensitivity to real-life conditions, thereby increasing the likelihood of 'the verisimilitude of a model, its accurate depiction of reality'.[37] This is an especially important virtue in view of my overarching methodological aim to infuse remedial theory with a pragmatic dimension.

Part I of my thesis develops a normative framework for evaluating the case studies in Part II. This is a common strategy in case study method whereby the analytic priorities that shape the research design are used to guide and organise case study analysis.[38] Embedding the case studies in a theoretical framework provides 'the optimum conditions for the acquisition of those illuminating insights which make formerly opaque connections suddenly pellucid.'[39] My normative framework therefore enhances the explanatory power of the case study material, drawing out the potential of the featured remedial innovations for overcoming the paradigm remedial puzzle posed by positive duties. Importantly, this framework is not rigidly superimposed on the case study material to generate clear-cut conclusions as to the success or failure of the remedies used. Rather, it is valuable for its ability to offer enriched explanations and evaluations of remedial decision-making while also leaving space for the case study material to spark new ideas that invite further theoretical development. As George and Bennett point out

[37] Gerring (n 28) 5.

[38] Yin (n 33) 136.

[39] J Clyde Mitchell, 'Case and Situation Analysis' in Matthew David (ed), *Case Study Research*, vol 1 (Sage 2006) 80.

in this context, '[t]he popular refrain that observations are theory-laden does not mean that they are theory-determined'.[40] My case studies therefore seek to strike a careful balance between theory-laden evaluations which use the language of my normative framework and 'thick description' which lets the case study material 'speak' for itself.

This gestures towards the way in which my case studies contribute to the development of remedial theory.[41] My evaluative framework draws out the potential of the *particular* remedial innovations featured in the case studies for addressing a more *general* phenomenon, namely the 'paradigm remedial puzzle' posed by positive duties. To articulate their potential for more general application, however, something is inevitably 'lost in translation': the contextual richness and specificity of the remedial innovations as they were developed in particular cases cannot be fully captured in the generalising language of my evaluative framework. Yet it is also precisely this 'process of moving from a specific to a more general explanation' that enables case study method to contribute to theory development.[42] Gerring summarises this constructive tension well:

> In sum, it seems justifiable for case studies to function on two levels simultaneously, the case study itself and some broader class of (perhaps difficult-to-specify) cases. The defining characteristic of the case study is its ability to infer a larger whole from a much smaller part. Yet both retain some importance in the final product. Thus, all case studies are to a certain extent betwixt and between. They partake of two worlds: they are particularizing *and* generalizing.[43]

The central challenge when using case studies to develop theory is to establish the strength of the external validity of the analytical inferences drawn from the case studies.

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[40] George and Bennett (n 29) 21.

[41] While theory testing has been the traditional focus of case study methodology, particularly in large-scale, quantitative cross-case analyses, the valuable role of case studies in developing new hypotheses and theories has received increasing recognition in the literature. See, for example, Yin (n 33); Mary Kennedy, 'Generalising From Single Case Studies' in Matthew David (ed), *Case Study Research*, vol 1 (Sage 2006); Eisenhardt (n 34); George and Bennett (n 29).

[42] George and Bennett (n 29) 114.

[43] Gerring (n 28) 80.

In other words, the researcher needs to be clear about the extent to which her findings are generalisable.

With this in mind, it is important to clarify the modest aim of my case studies in developing remedial theory, beyond its more general contribution of infusing remedial theory with a pragmatic dimension. My evaluation of the innovative remedies featured in the case studies illuminates their potential for more generalised application, but the scope of this generalisation is limited in two significant ways. Firstly, I do not attempt to make sweeping generalisations about the value of these remedial innovations for human rights adjudication more generally, but rather offer *contingent*, or *conditional*, generalisations that relate to a limited sub-class of phenomena—what I characterise in the thesis as the 'paradigm remedial puzzle' posed by positive duties.[44] Secondly, I merely seek to identify and illuminate the *potential* of these remedial innovations to optimise the exercise of discretionary remedial power, rather than make any predictive or probabilistic assessment as to whether they would yield success in future cases.[45] Indeed, the evaluative framework I develop in Chapter Four deliberately precludes this kind of predictive generalisation by requiring the *contextualised* prioritisation and optimisation of my remedial principles within any particular case. Thus it sets out the optimal *conditions* for exercising discretionary remedial power, but the case-specific process of remedial decision-making resists any predetermined generalisation as to the likely success of particular remedies.

Having clarified my methodology and its modest aims in developing remedial theory, it should be clear that this project does not attempt to engage with the question

[44] For the value of contingent generalisations in theory development, see George and Bennett (n 29) 30–31, 77, 266. Echoing their warning, I have been 'careful in providing circumscribed "contingent generalizations" that subsequent researchers should not mistakenly overgeneralize.' ibid 84.

[45] See Yin (n 33) 21; George and Bennett (n 29) 266.

as to whether, and how, courts can be agents of social change. The rich literature on legal mobilisation theory offers an account, albeit fiercely contested, as to how successful litigation can be in achieving measurable material or political impact.[46] This project does not seek to describe, measure or predict the impact of remedial decision-making but rather uncovers possibilities for how courts might optimise the exercise of their discretionary remedial power. The likely impact of greater remedial optimisation on the role of courts in social reform remains a question for future research.

C. Case Study Selection

My two case studies were carefully chosen to achieve the methodological aims set out above. They both provide rich material for the contextualised application of my evaluative framework, yielding detailed insights into the complexity of remedial challenges associated with positive duties and demonstrating how the exercise of discretionary remedial power can be optimised through remedial innovation. In selecting these case studies, I have made no attempt to choose remedies that could be

[46] Much of this literature continues to contest the pioneering work of Gerald Rosenberg, who set out competing views of the potential for courts to achieve social change in the United States. In Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, UCP 2008) 2-3, he contrasts the model of the 'Dynamic Court', which views courts as 'powerful, vigorous, and potent proponents of change', with the model of the 'Constrained Court', which sees courts as 'weak, ineffective, and powerless'. Rosenberg offers a bleak account of the agency of federal courts in the United States, arguing that they are closer to the 'Constrained Court' because they operate under constraints which can only be overcome under certain limited conditions (Rosenberg ibid 33-35). The Rosenberg thesis has been highly influential in framing the discourse on legal mobilisation theory, but it has also been fiercely opposed. While Rosenberg's focus is on material impact, as is evident from the fact that he defines 'significant social reform' as 'policy change with nationwide impact' (Rosenberg ibid 4), other academic work shifts attention to the political impacts of litigation. For example, Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (2nd edn, UMP 2004) concedes the limited *direct* impact of courts on public policy and social change, but shows how the 'myth of rights' – that is, the symbolic role of rights in American life – can be a useful resource in political mobilisation that achieves social change. In the context of education financing litigation, Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* (SUP 2009) 2-3 underscores the interplay between law and politics with his metaphor of 'legal translation', which refers to 'the conceptual and rhetorical processes through which reformers translate their values and goals into plausible legal claims and arguments'. Through the lens of education financing litigation, Paris therefore emphasises the strategic importance of complementing legal strategies with broader social and political mobilisation.

characterised as 'typical' or 'representative' of human rights adjudication but rather sought out atypical or outlier cases that can shed light on new ways to overcome the remedial challenges associated with enforcing the state's positive duties. While more representative case studies might enrich our understanding of the traditional remedial repertoire, my focus on experimental and innovative remedies advances the constructive project of this thesis by offering creative possibilities for courts to optimise the exercise of their discretionary remedial power.

The complexity and contextual richness offered by each case study is further enhanced by the complementary pairing that they represent. My case study method involves within-case analysis rather than cross-case analysis, such that each case study has integrity in making a 'stand-alone' contribution.[47] Yet there are significant resonances between the two cases that serve to unify Part II as one coherent contribution. The introduction to Part II provides a more comprehensive account of this complementary pairing, but three key features are worth highlighting here. Firstly, both case studies concern the state's failure to fulfil the right to education. More particularly, they address the *adequacy* or *quality* of education that the state is constitutionally obliged to provide. This thematic unity tightens the focus of my case study contribution and foregrounds some fascinating connections and contrasts between the educational and constitutional settings within which the litigation unfolded. At the same time, this thematic unity does not result in a duplication of the case study contributions, since they each address different remedial challenges associated with enforcing the state's positive duties in education—the CFE litigation is squarely focused on education financing while the LRC litigation grapples with the more multi-faced challenge of implementing systemic relief after a budget has been secured.

[47] George and Bennett (n 29) 18.

Secondly, both case studies cover jurisdictions in which my research question is directly relevant rather than simply a hypothetical question. The right to education is entrenched in both the New York State Constitution[48] and the South African Constitution[49] and the courts are equipped with broad and discretionary remedial power to enforce the state's positive duties to fulfil the right. Rather than focusing on apex courts as is common in doctrinal or comparative research in constitutional law, my case studies look to state or provincial courts as much pioneering remedial innovation happens in these 'lower' courts.[50] However, their respective judiciaries operate within markedly different constitutional cultures and institutional settings, making for an instructive contrast of the constraints and imperatives which shape the court's exercise of remedial discretion. While the remedial innovations featured in the case studies cannot be uncritically generalised or transplanted into other jurisdictional contexts, their insights can sharpen one's reasoning in fleshing out such models.

Finally, both case studies feature serialised litigation which share strong structural similarities. They exemplify the extended remedial process that is paradigmatic to the enforcement of positive duties,[51] demonstrating both the diversity and the fluidity of forms that the exercise of discretionary remedial power can take.[52] The progression of

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[48] Art XI s 1 of the New York Constitution requires that '[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated'.

[49] S 29(1)(a) of the Constitution of the Republic of South Africa, 1996 states that '[e]veryone has the right to a basic education, including adult basic education'.

[50] For further discussion on US state courts as 'laboratories of [remedial] experimentation', see Helen Hershkoff and Stephen Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' (2011) 115 Penn State Law Review 923, 981–982. For an insight into the cross-fertilisation in remedial development between the Constitutional Court and High Courts in South Africa, see Helen Taylor, 'Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation' (2019) 9 Constitutional Court Review (forthcoming).

[51] See Chapter Two, Section II.

[52] See Chapter Three, Section V.

litigation in each case study unfolds in an iterative process as the remedial plan is refined and recalibrated at each stage. In the CFE litigation, this iterative remedial process is reflected in the disagreements between the trial court and the split Court of Appeals at each of the three stages in the protracted case. In the LRC litigation, this iterative remedial process plays out through successive settlements that ultimately lead to a fully-fledged judgment from the court. Most importantly, the overarching trajectory of remedial development in both case studies culminates in a similar fashion, with persistent non-compliance serving as a catalyst for remedial innovation.

IV. Contribution

This thesis represents a significant contribution in several respects. Firstly, its focus on positive duties adds a new perspective to the human rights literature on remedies. It cuts across several different areas of human rights and constitutional law, connecting literatures as diverse and distinctive as public law litigation in the United States and socio-economic rights jurisprudence in South Africa. The remedial lens of positive duties brings into focus their shared remedial challenges and offers an enriched account of the judicial role in this remedial context. Secondly, the thesis develops a normative framework for the exercise of discretionary remedial power by identifying specific remedial principles and a structured reasoning process for their contextualised application in particular cases. This normative framework may appeal to a diverse target audience: academics whose work focuses on the judicial role in the remedial context, strategic litigators who require a good understanding of remedy to build a successful case, and even judges, being those tasking with the discretionary remedial decision-making that is the focus of this thesis. Thirdly, the creative contribution of the thesis lies in its identification of remedial innovations that have potential to find more generalised application as remedies for optimising the exercise of discretionary remedial power. The thesis therefore points to opportunities for future theoretical research in fleshing out these models for more generalised application. Fourthly, the thesis makes a significant methodological contribution in bridging remedial theory and practice through its dialectical research process and use of case study method. Much of the existing literature adopts either a theoretical approach in which remedies are abstracted from practical and contextual realities, or a doctrinal approach with apex courts as the dominant focus. My research fills a gap in this literature by infusing remedial theory with a pragmatic dimension, demonstrating the value of close attention to the remedial challenges that courts face as a matter of descriptive constitutional practice.

Drawing these contributions together, the thesis represents a constructive project that takes the debate about the judicial role in human rights adjudication forward—confronting the challenging reality of remedial practice, calling for greater remedial innovation to overcome these challenges, and reclaiming a positive role for the court in achieving this. It offers a refreshing shift in perspective from the preoccupation in the literature with limiting and constraining the exercise of discretionary remedial power to the more productive and relevant question of how it can be *optimised*. Instead of asking *how little* will suffice to protect rights, this thesis asks the more exploratory—and provocative—question of *how much* can be achieved through the court's exercise of discretionary remedial power.

PART I

Chapter Two

Rights, Remedies and Positive duties

Ubi ius, ibi remedium[1]

Introduction

The maxim 'where there is a right, there is a remedy' speaks to the importance of remedies for the vindication of rights.[2] While Blackstone's widely cited formulation helped entrench it as a fundamental common law principle,[3] an even earlier pronouncement of it was given by Lord Holt CJ in *Ashby v White*:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and, indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[4]

The maxim has been endorsed by apex courts in many common law jurisdictions,[5] finding particular salience in the context of constitutionally entrenched human rights as the right to a remedy is recognised as 'one of the most fundamental and essential rights

[1] 'Where there is a right, there is a remedy.'

[2] The maxim has been interpreted and employed in various ways, not least because there is some ambiguity as to whether it is prescriptive or hortatory: see Kate Hofmeyr, 'A Central-Case Analysis of Constitutional Remedial Power' (2008) 125 South African Law Journal 521, 533 fn 53. I use it here in the prescriptive sense as it most commonly referenced in the constitutional context as establishing the right to a remedy.

[3] 'For it is 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.' 3 Bl Comm 109. For further discussion on the origins of the right to a remedy, see Thomas R Phillips, 'The Constitutional Right to a Remedy' (2003) 78 New York University Law Review 1309, 1319–1325.

[4] *Ashby v White* (1703) 2 Ld Raym 938, 92 126 (ER).

[5] *Marbury v Madison* 5 US 137 (1803) 163 (Marshall CJ); *Shiv Shanker Dal Mills v State Of Haryana* 1980 SCR (1) 1170; *Nelles v Ontario* [1989] 2 SCR 170, 196 (Lamer J); *August v Electoral Commission* 1999 (3) SA 1 (CC) [34] (Sachs J).

for the effective protection of all other fundamental rights'.[6] For example, it has been described as 'the defining legal principle of the South African legal order with respect to the enforcement of the Constitution'[7] and as 'the foundation stone for the effective enforcement of Charter rights' in Canada.[8]

This chapter affirms the importance of remedies for the realisation of rights while also problematising the elegant simplicity of the relationship between rights and remedies that is presumed by the maxim. Although widely hailed as 'a self-evident truth',[9] it is also in some sense 'a singularly unhelpful maxim'[10] as it does not tell us anything about the nature of the relationship between rights and remedies. Indeed, the cynical observation has been made that 'it is probably more accurate to say that where there's a right, there may be many remedies, or none'.[11] This is most clearly discerned in the enforcement of positive duties, as there is often a range of remedial possibilities for fulfilling the right at stake rather than one self-evident remedy that flows ineluctably from the breach. This 'flexible' rather than 'tight' right-remedy interlock is borne out by the discretionary nature of constitutional remedial power.[12] The maxim *ubi ius ibi remedium* can therefore at most be said to establish the right to *a* remedy, but not the right to a *particular* remedy.[13]

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[6] International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (International Commission of Jurists 2008) 7 <https://www.icj.org/courts-and-the-legal-enforcement-of-economic-social-and-cultural-rights/> accessed 6 December 2018.

[7] Pierre de Vos and Warren Freedman (eds), *South African Constitutional Law in Context* (OUP 2015) 415.

[8] *Mills v R* [1986] 1 SCR 863, 881 (Lamer J).

[9] Jeffrey Berryman, 'Foreword' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991).

[10] David Schoenbrod and others (eds), *Remedies: Public and Private* (3rd edn, West Group 2002) 11.

[11] ibid 33.

[12] Hofmeyr (n 2) 549.

[13] ibid 533–534.

Rather, it is through the court's exercise of discretionary remedial power that any particular remedy is granted for the breach of the state's positive duty.

The modest but foundational contribution of this chapter is to underscore both the difficulty and the importance of remedying breaches of positive duties by illuminating the interdependence of rights and remedies. The first half of the chapter sets up the problem that my thesis addresses. Section I discerns a remedial paradigm shift by contrasting the range and complexity of remedies for breaches of positive duties with a received remedial paradigm, epitomised by private law, which sits more easily with backward-looking duties of restraint. I characterise the distinctive features of remedies for breaches of positive duties as 'family resemblances' in recognition of the fact that, while common traits, they are neither universal nor exclusive to remedies for breaches of positive duties. The paradigm remedy for enforcing positive duties exemplifies these family resemblances and enables us to discern the remedial paradigm shift that the judicial enforcement of positive duties entails. Section II characterises what I call the 'paradigm remedial puzzle' posed by positive duties. My discussion of these paradigmatic remedial challenges are grouped together under two headings: (1) ascertaining systemic relief; and (2) promoting accountability for compliance. The concept of a 'remedial process' is introduced to capture the continuity between remedy and enforcement that results from the lengthening and diversification of court involvement in the remedial paradigm of positive duties.

The second half of the chapter lays the conceptual groundwork for my thesis by clarifying the relationship between rights and remedies, with special attention to its implications for enforcing positive duties. Section III draws on Daryl Levinson's seminal work to expose the pervasive constitutional fiction of 'rights essentialism' that conceives of remedies as neatly severable from the 'pure' constitutional values embodied by rights.[14] A more accurate account of constitutional practice is captured by Levinson's theory of 'remedial equilibration' which recognises the interdependence of rights and remedies. I draw out the central role of discretionary remedial power in mediating this relationship as remedial concerns and consequences can shape the way that rights are conceived. Section IV brings remedial equilibration to bear on the remedial challenges associated with enforcing positive duties, yielding the following key insights: (1) the remedial implications of positive duties are constitutive of rights; (2) a strict institutional division of constitutional labour between adjudication and enforcement is artificial; and (3) full compliance with remedial orders is crucial for optimising the value of rights.

I. The Remedial Paradigm of Positive Duties

A. A Remedial Paradigm Shift

As noted above, the maxim 'where there is a right, there is a remedy' presumes a straightforward 'fit' or tight 'interlock' between right and remedy. A right is thought to have a discrete, self-evident remedial counterpart, leaving little room for discretion in the choice of remedy that should follow a breach. This fixed understanding of the right-remedy interlock has been unsettled by the diversity and complexity of remedies that have been developed to enforce constitutionally entrenched human rights. Abram Chayes' famous characterisation of 'public law litigation' offers a striking illustration of this shift to a new remedial paradigm that challenged a fixed understanding of the right-remedy interlock. In his influential 1976 article entitled 'The Role of the Judge in Public

[14] Daryl J Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 Columbia Law Review 857.

Law Litigation', Chayes detected a major shift in the mode of adjudication taking place in federal district courts across the United States:

> We are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model.[15]

He illuminated the rise of this new model by contrasting its characteristic features with the 'traditional conception of adjudication' epitomised by private disputes between private individuals. Chayes offered a 'capsule description' of the received tradition that he acknowledged was 'no doubt overdrawn',[16] but it allowed him to accentuate the ways in which the emerging model of public law litigation 'reverses many of the crucial characteristics and assumptions of the traditional model'.[17]

Most significantly for purposes of this thesis, Chayes identified the decree, or remedial order, as the 'centerpiece' of public law litigation, observing that it 'differs in almost every relevant characteristic from relief in the traditional model of adjudication, not least because it *is* the centerpiece'.[18] Several of the contrasting features identified by Chayes draw out the fundamentally different nature of remedial relief in public law litigation and its implications for the judicial role. The remedy in public law litigation is not logically derived from the nature of the breach or conceived as compensation for a past wrong but is rather forward-looking and deliberately fashioned on flexible and broadly remedial lines.[19] For this reason, the remedy is not judicially imposed but instead

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[15] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1975) 89 Harvard Law Review 1281, 1282.

[16] ibid 1283.

[17] ibid 1302.

[18] ibid 1298.

[19] ibid.

formulated through negotiation.[20] Rather than the 'simple, one-shot, one-way transfer' of a tight right-remedy interlock, a remedial order in public law litigation sets in motion a 'complex, on-going regime of performance'.[21] The upshot of this is that the impact of the remedial order is not confined to the parties but rather often implicates a wide range of persons absent before the court.[22] It also holds significant implications for the judicial role, as the remedial order does not bring a discrete end to judicial involvement but rather 'prolongs and deepens' it by relying on the court's continued participation in the administration of the remedy.[23] In public law litigation, the judge is not merely a passive and neutral arbiter in adversarial, party-initiated and party-controlled litigation.[24] He is instead the dominant figure actively organising and shaping the litigation to ensure a just and viable outcome, drawing support from the parties and their counsel as well as a wide range of outside sources such as masters, experts and oversight personnel.[25]

Chayes' account of the emergence of public law litigation resonates with Thomas Kuhn's theory of the crisis and revolution that characterises a 'paradigm shift'.[26] In *The Structure of Scientific Revolutions*, Kuhn argues that scientific practice within a particular tradition involves recognising the resemblance between an apparently disparate group of problems and an established achievement that has acquired the status of a paradigm

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[20] ibid 1302.

[21] ibid 1298.

[22] ibid 1284.

[23] ibid 1298.

[24] ibid 1282–1283.

[25] ibid 1302.

[26] In identifying these resonances, I am not presuming any neat analogy can be drawn between legal and scientific disciplines of knowledge or arguing that the law can be understood as a 'disciplinary matrix' in the Kuhnian sense. For an interesting enquiry into this question, see Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon 1995) 42–58.

model within the scientific community. These paradigm models are the shared examples which both define a particular tradition of scientific research (what Kuhn calls 'normal science') and serve as the models for solving the puzzles that remain.[27] However, when new puzzles cannot be solved using the methods legitimised by the paradigm, these intractable anomalies cause a crisis within the scientific tradition which persists until a new achievement recognises these anomalies as the new paradigm of the scientific revolution. This process of crisis and revolution is what Kuhn calls a 'paradigm shift'. 'Paradigm', as Kuhn uses it in this global sense, means 'the entire constellation of beliefs, values, techniques and so on shared by members of a given community',[28] although paradigms-as-exemplars (paradigms in the local sense) are crucial components of this broader disciplinary matrix that is a scientific paradigm.[29] Indeed, it is the paradigm-as-exemplar which illuminates a paradigm shift by making anomalies intelligible as the new paradigms of the scientific revolution.

The two models of adjudication that Chayes outlines present competing remedial paradigms, each epitomised by particular paradigm puzzles and techniques for their solution. His account captures the prevailing crisis that precedes a paradigm shift, described by Kuhn as eliciting 'a proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals'.[30] In tracing the early achievements of public law litigation, Chayes questions whether this new model is 'a temporary, add-on phenomenon' or

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[27] Thomas S Kuhn, *The Structure of Scientific Revolutions* (Ian Hacking ed, 4th edn, UCP 2012) 10.

[28] ibid 175.

[29] ibid 187. In a postscript to *The Structure of Scientific Revolutions,* Kuhn clarified his use of the term 'paradigm' after receiving criticism about the slippage in his use of it. For example, Margaret Masterman discerned twenty-one ways in which Kuhn had used the word. See Margaret Masterman, 'The Nature of a Paradigm' in Imre Lakatos and Alan Musgrave (eds), *Criticism and the Growth of Knowledge* (CUP 1970).

[30] Kuhn (n 27) 91.

whether 'the new form has already or is likely to become the dominant form of litigation in the federal courts'.[31] Offering 'a first appraisal' of public law litigation, Chayes notes an initial rejection of the new model for being 'an intolerable hodge-podge of legislative, administrative, executive, and judicial functions addressed to problems that are by their nature inappropriate for judicial resolution'.[32] For instance, he references Lon Fuller's characterisation of public law litigation as being 'parasitic' on the traditional judicial function, and therefore only sustainable to a limited degree before it undermines the legitimacy and moral force of the courts.[33] Owen Fiss similarly observed the mixed reception that this new model received, with the courts 'deeply divided; even when structural reform survived, there was usually a high-pitched dissent'.[34] Defending its legitimacy, however, Fiss questioned the assumed normative priority of the traditional dispute resolution model.[35]

Chayes rejected the characterisation of public law litigation as parasitic on the traditional model, instead portraying its alleged anomalies as the new paradigms of public law litigation. By placing the two stylised models beside each other, Chayes was able to illuminate the emergence of public law litigation as a new and distinct phenomenon rather than simply an anomaly of the traditional model. He argued that the exemplars of public law litigation—school desegregation, employment discrimination and prisoners'

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[31] Chayes (n 15) 1303.

[32] ibid 1304.

[33] ibid. For Fuller's account as published later, see Lon Fuller, 'The Forms and Limits of Adjudication' (1979) 92 Harvard Law Review 353, 405–409.

[34] Owen Fiss, 'Foreword: The Forms of Justice' (1979) 93 Harvard Law Review 1, 4.

[35] ibid 3–5. See further Oonagh Elizabeth Fitzgerald, 'Understanding Charter Remedies: A Dialectical and Contextual Approach' (PhD thesis, University of Toronto 1994) 287.

rights litigation[36]—represented a fundamental shift rather than minor tinkering within an established tradition:

> Most discussion of these procedural developments, while recognizing that change has been far-reaching, proceeds on the assumption that the new devices are no more than piecemeal 'reforms' aimed at improving the functional characteristics or the efficiency of litigation conducted essentially in the traditional mode. I suggest, however, that these developments are interrelated as members of a recognizable, if changing, system and that taken together they display a new model of judicial action and the judicial role, both of which depart sharply from received conceptions.[37]

By articulating this distinctive morphology of public law litigation, Chayes changed the terms of debate around the legitimacy of the judicial role in this context. Instead of offering a strained justification wedded to the traditional model of adjudication, he acknowledged that public law litigation 'explicitly rejects many of the constraints of judicial method and procedure in which we have characteristically sought refuge from the unease' of judges wielding power over democratically elected officials.[38] His article accordingly called for alternative theories to ground the legitimacy of the judicial role in public law litigation. Chayes' pioneering account generated rich academic debate and remains widely cited as the canonical description of public law litigation in the United States.[39]

The 'protean persistence of public law litigation'[40] since Chayes' pioneering account has proved his analysis right. The early achievements of public law litigation—*Brown v Board of Education*[41] being chief among them—proved 'sufficiently unprecedented to attract an enduring group of adherents away from competing modes' of adjudication

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[36] Chayes describes these as the 'avatars of this new form of litigation'. Chayes (n 15) 1284.

[37] ibid 1289.

[38] ibid 1315.

[39] Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015, 1017.

[40] ibid 1021.

[41] *Brown v Board of Education* 347 US 483 (1954) (*Brown I*); *Brown v Board of Education* 349 US 294 (1955) (*Brown II*). I collectively refer to these two cases as '*Brown*'.

and also 'sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve'.[42] The CFE litigation covered in Chapter Five is part of this legacy, both reflecting the emerging consensus about the legitimacy of the new paradigm of public law litigation while also grappling with its remaining puzzles. In this way, it embodies the 'essential tension' between tradition and innovation that Kuhn identifies as a necessity of any paradigm.[43] If the remedial challenges posed by desegregation in *Brown* can be characterised as a paradigm puzzle of public law litigation, then the paradigm's main tool for puzzle-solving has been the structural injunction. *Brown* therefore did not only trigger a 'rights revolution'[44] but also a 'new jurisprudence of public law remedies'[45]—it was 'a new paradigm of constitutional adjudication *and* remediation'.[46] It should therefore come as no surprise that structural remedies have been at the heart of critical debate about public law litigation and that out of the ferment, new remedial innovations have arisen. Sabel and Simon identify the evolution of structural remedies as the biggest change to Chayes' model, involving a shift away from command-and-control injunctive regulation towards more experimentalist intervention.[47] This remedial paradigm shift is the focus of my thesis, as I explore the remedial innovations that have been developed to solve the paradigm puzzle posed by positive duties.

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[42] Kuhn (n 27) 10–11.

[43] Thomas S Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (Lorenz Krüger ed, UCP 1977).

[44] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Court in Comparative Perspective* (UCP 1998).

[45] Robert E Jr Buckholz and others, 'Special Project: The Remedial Process in Institutional Reform Litigation' (1978) 78 Columbia Law Review 784, 789.

[46] Fitzgerald (n 35) 223 (my emphasis).

[47] Sabel and Simon (n 39) 1019.

B. The Family Resemblances Shared By Remedies Enforcing Positive Duties

Kent Roach has drawn on Chayes' work as the 'intellectual foundation' for his identification of the remedial dichotomies commonly used to distinguish socio-economic rights from civil and political rights.[48] Extending Chayes' insights, Roach observes that the enforcement of civil and political rights is assumed to align more easily with the received remedial tradition, with its backward-looking, compensatory remedies that 'mimic the remedial process and aims of private law'.[49] There is little scope for remedial discretion as relief can be neatly derived from the nature of the breach. This enhances the legitimacy of the judicial enforcement of civil and political rights as the court's remedial function is thought to 'lie within the core jurisdiction of domestic courts'.[50] In contrast, the range and complexity of possible remedies for enforcing socio-economic rights necessitates a central role for judicial discretion. Remedial decision-making has to navigate tensions and trade-offs between competing interests that hold distributive and dialogic implications.[51] Importantly, these remedial challenges feature strongly in objections to the judicial enforcement of socio-economic rights.[52] Roach argues that these contrasts are predicated on a set of remedial dichotomies: remedies for violations of civil and political rights are considered a matter of *corrective* justice, providing *individual* relief that is *immediate* in effect and *coercive* in mode; on the other hand, remedies for violations of socio-economic rights are considered a matter of *distributive* justice,

48 Kent Roach, 'The Challenges of Crafting Remedies for Violations of Social, Economic and Cultural Rights' in Malcolm Langford (ed), *Social Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009) 47.

49 ibid 46.

50 ibid.

51 ibid.

52 ibid.

providing *systemic* relief that is *prospective* or even delayed in effect, and *dialogic* in mode. The two groups of rights are therefore structured around these remedial dichotomies: corrective/distributive; individual/systemic; immediate/prospective; coercive/dialogic.

These remedial dichotomies can be criticised from two angles. Firstly, recent academic literature has unsettled the traditional distinction between socio-economic rights and civil and political rights, such that there is now growing consensus that all rights are indivisible, interdependent and interrelated.[53] Indeed, the very aim of Roach's argument is to 'narrow the gap' between the two sets of rights by showing that the stark remedial dichotomies underestimate the complexities of enforcing civil and political rights and risk relegating socio-economic rights to the realm of unenforceability.[54] A particularly significant contribution to this body of literature has been the insight that *all* rights give rise to a range of duties, both positive and negative.[55] This exposes the incoherence of an attempt to distinguish rights on the basis of the kind of duty to which they give rise—with negative duties of restraint being attached to civil and political rights while positive duties are exclusively attached to socio-economic rights.[56] Instead, as Fredman argues, it is more fruitful to 'consider each right as giving rise to a cluster of obligations, some of which require the State to abstain from interfering, and others which entail positive action and resource allocation'.[57] The upshot of this more nuanced conception, as illuminated by Shue, is that 'the complete fulfilment of each kind of right

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[53] Vienna Declaration and Programme of Action UNGA Res A/RES/48/121 (1993).

[54] Roach (n 48) 46.

[55] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (PUP 1996); Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008); Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 54–59.

[56] Fredman (n 55) 67; Liebenberg (n 55) 54–59.

[57] Fredman (n 55) 69.

involves the performance of multiple kinds of duties'.[58] This approach encourages greater clarity as to both the nature of the right and the nature of the duty concerned. A focus on positive duties grounds an analysis within its particular legal relation to a right rather than indulging a conception of rights as untethered to obligations. This is in keeping with Hohfeld's fundamental insight that 'right' and 'duty' are correlatives that describe two sides of one legal relation.[59] As O'Rourke remarks in his Hohfeldian analysis of constitutional law, rights and duties are 'different vantage points upon a single relationship'.[60] The 'vantage point' taken in this thesis is on *duties* rather than rights. Moreover, this 'point of observation'[61] is narrowed to focus on the legal relation between rights and *positive* duties because of the particular kinds of remedial challenges that are generated by their breach.

With the benefit of these insights, it is clear that the more relevant distinction underlying the remedial dichotomies identified by Roach is between positive and negative duties, rather than the very tenuous distinction between socio-economic rights and civil and political rights. Remedies for the state's breach of negative duties (whether flowing from socio-economic or civil and political rights) are more likely to conform to the received remedial tradition, epitomised by private law, where the remedy derives closely from the breach and is typically corrective, individualised, immediate, coercive and compensatory in character. Remedial choice for enforcing positive duties, by contrast, is not self-evident. There is a measure of flexibility in the right-remedy interlock

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58 Shue (n 55) 51.

59 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, Yale University Press 1919); Allen Thomas O'Rourke, 'Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law' (2009) 61 South Carolina Law Review 141, 150.

60 O'Rourke (n 59) 169–170.

61 Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana 1960) 85.

as the breach of a positive duty does not dictate any unique remedy to the exclusion of all other remedial options.[62] On the contrary, courts are usually faced with a range of possible remedial options within the scope of their appropriate exercise of discretionary remedial power. This 'openness' of remedial possibilities for enforcing positive duties poses remedial challenges that do not typically arise in relation to the judicial enforcement of negative duties of restraint. The forward-looking, resource-intensive dimension of positive duties implies a measure of temporal, contextual and institutional contingency that is not present when enforcing backward-looking duties of restraint. As discussed in Section II below, this contingency can make it difficult to ascertain what systemic relief is required to remedy the breach and to ensure accountability for its implementation. Importantly, these remedial challenges associated with positive duties are not limited to progressively realisable rights or socio-economic rights. The case studies in Part II of this thesis explore these remedial challenges in relation to the immediately realisable right to education, while the judicial enforcement of the state's positive duty to fulfil prisoners' right to vote in South Africa illustrates how these same challenges can emerge in relation to breaches of civil and political rights.[63]

The second criticism to be levelled against the remedial dichotomies depicted above is that they are stylised archetypes that belie a more nuanced descriptive reality. Roach himself argues that these remedial dichotomies are frequently overstated, thereby ignoring the complexity of some remedies for breaches of civil and political rights.[64] Similarly, in delineating the contrasting features of the two models of adjudication,

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[62] This flexibility in the right-remedy interlock is most pronounced in the enforcement of positive duties, but as Hofmeyr observes, the consequences of a rights violation are always contingent on the exercise of remedial discretion. See Hofmeyr (n 2) 523.

[63] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280 (CC) especially [28] (Chaskalson CJ).

[64] Roach (n 48) 46.

Chayes acknowledged that his portrayal was overdrawn.[65] This is because 'not every remedy in a public law case deviates from the traditional model of judicial decision-making' and '[n]or is the public law remedial context unique in its tendency to exhibit these characteristics'.[66] Writing in the context of the Canadian Charter,[67] Jamie Cassels has warned against a strong dichotomisation between private law and public law remedies:

> Insofar as the private model openly recognizes the correlative nature of rights and obligations, remedial benefits and burdens, and seeks to mediate between conflicting interests, insights from the private law model may appropriately be brought to bear in developing principles of remedial selection in *Charter* adjudication. In suggesting this affinity, however, I do not mean to imply the conclusion that the private law method of remedial choice should simply be imported into *Charter* litigation...[T]here are also vital differences between private and public litigation in terms of the interests that are at stake in *Charter* litigation, the purposes sought to be achieved by the courts, and the processes by which those purposes are pursued. These differences are so fundamental that they undermine any attempt simply to translate private law notions into a language suitable for public litigation.[68]

It is therefore important to appreciate the affinities between public law and private law remedies as well as their differences which necessitate a new and distinctive remedial language. Remedies are to a certain degree 'trans-substantive' in the sense that they address the same kinds of problems across all areas of the law,[69] but this does not detract from the fact that there are also distinctive remedial characteristics which 'tend to converge in the public remedial context, prompting the proliferation of novel judicial forms and processes'.[70]

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65 Chayes (n 15) 1283.

66 Susan Sturm, 'A Normative Theory of Public Law Remedies' (1991) 79 Georgetown Law Journal 1355, 1377.

67 Charter of Rights and Freedoms, enacted in Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c.11.

68 Jamie Cassells, 'An Inconvenient Balance: The Injunction as a Charter Remedy' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991) 291.

69 Schoenbrod and others (n 10) 3; Kent Roach and Robert J Sharpe (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice 2010).

70 Sturm (n 66) 1378.

Even applied to the distinction between positive and negative duties, Roach's remedial dichotomies are overdrawn. This is because the nature of the correlative right has a bearing on the complexity of the remedial process to fulfil it. Positive duties may correlate with a right to the provision of some specific object or good, or they may correlate with a right to some positive act by the State which would create the legal or administrative framework needed to make such provision available.[71] The provision of a specific object or good, such as the infrastructure for new minority language schools[72] or mid-day school meals,[73] generally implicates the court in a more complex administrative and oversight role than a positive act to put in place a legal or administrative framework, such as legislative provisions enabling same-sex couples to marry, where the complexity of implementation is largely contained within legislative decision-making.[74] This distinction nuances our understanding of remedies for breaches of positive duties, but it should not be overstated as the dominant strain among positive duties remains their distributive, systemic, resource-intensive, forward-looking and dialogic remedial features.

Instead of strict dichotomies, the set of distinctive remedial features shared by positive duties can be more accurately conceived of as 'family resemblances' in the sense developed by Wittgenstein in *Philosophical Investigations*.[75] He uses the concept of 'family resemblances' to explain the criss-crossing similarities between different kinds of games:

> Consider for example the proceedings that we call 'games'. I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?...For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of

[71] Fredman (n 55) 88.

[72] See, for example, *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3.

[73] See, for example, *People's Union for Civil Liberties v Union of India* Writ Petition (Civil) 196 of 2001.

[74] See, for example, *Minister of Home Affairs v Fourie* 2006 (1) 524 (CC); *Halpern v Attorney General of Canada* (2003) 65 OR (3d) 161 (CA).

[75] Ludwig Wittgenstein, *Philosophical Investigations* (Gertrude Elizabeth Margaret Anscombe tr, Blackwell 1958). Note that Wittgenstein's own English translation of 'familieähnlichkeit' was 'family likeness'.

> them at that...[S]imilarities crop up and disappear. And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.
> I can think of no better expression to characterize these similarities than 'family resemblances'; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc. etc. overlap and criss-cross in the same way.—And I shall say: 'games' form a family.[76]

Applied to the present context, we can say that remedies enforcing positive duties share certain 'family resemblances' rather than any single essence common to all examples. They have criss-crossing similarities which are not always present, nor exact in their boundaries, nor even exclusive to the 'family' of positive duties. A certain characteristic may therefore be present to varying degrees among remedies in the 'family' of positive duties, or be entirely absent from some remedies, or perhaps even be present in a remedy from the 'family' of negative duties.

C. Family Resemblances and the Paradigm Case

So far, I have used the notion of 'family resemblances' simply to capture the fact that remedies for breaches of positive duties share certain distinctive features which, while commonly found, are not common to all such remedies. Instead, there are 'blurred edges' around this family of remedies.[77] To realise the full explanatory power of this idea for purposes of scoping the problem that my thesis addresses, it is necessary to explain why some resemblances are *family* resemblances and thereby allow us to speak coherently of a distinctive family of remedies. There are two concepts evoked by the notion of 'family resemblances' that help here: 'kinship' and 'similarities'.[78] The concept of 'kinship'

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[76] ibid 66–67.

[77] ibid 71.

[78] Hans Sluga, 'Family Resemblance' (2006) 71 Grazer Philosophische Studien 1, 14. Note that I am simply using the idea of 'family resemblances' to illuminate the remedial features shared by positive duties and thereby to enable the recognition of certain paradigm cases which set the scope of my thesis. This limited

speaks to the fact that a family of remedies can be identified through their common conceptual 'descent' from the breach of a particular kind of duty. In this sense, the family of remedies addressed in this thesis are causally connected to breaches of positive duties. The concept of 'similarities' further narrows the scope of my enquiry as it fixes my focus on the affinity and correspondence between remedies for breaches of positive duties, rather than their differences. In particular, my concern is with remedial resemblances of a distinctive kind, namely those similarities which connect remedies for breaches of positive duties in a way that enables us to speak of them as a 'family'.

The notion of a paradigm case explains why some similarities ground connections that elevate them to the status of family resemblances. A paradigm case contains the *set* of features that function as family resemblances—it exemplifies the criss-crossing similarities that are shared by a class of things. There must therefore be a paradigm case for resemblances to be *family* resemblances rather than mere similarities. The philosopher Michael A. Simon has illustrated how this works in relation to Wittgenstein's example of games:

> [T]here must be at least one activity which embodies all of the characteristics that might be possessed by anything that could be classified as a game by virtue of possessing any of these characteristics, or any set of these characteristics. Such an activity might be the game of tennis, or perhaps the game of bridge; each of these exhibits, at least under certain circumstances, every feature that could properly be cited in justification of the extension of the term 'game' to anything that could not itself be regarded as a paradigm case of a game, such as solitaire, hide-and-seek, ring-a-ring-a-roses, or charades. It also follows that none of the differences between, say tennis and bridge is of any relevance to their being games, if they are both to be regarded as paradigms. The point is not that there is no set of features that properly constitutes anything that possesses them as a game, but rather that this set of 'essential' features defines not a game but a paradigm case of a game. The simple fact of the matter is that not everything that is properly called a game is a paradigmatic example of a game...and hence we cannot expect to find any such set of features that are common to *all* games.[79]

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application of the concept of 'family resemblances' does not touch on the philosophical question as to whether Wittgenstein's idea can ground a comprehensive theory of general terms and concepts. I am not attempting an explanation of how we use the term 'remedy' to cover a diversity of examples but, more modestly, how we can talk coherently about remedies for enforcing positive duties as being somehow distinctive from remedies for enforcing negative duties.

[79] Michael A Simon, 'When Is a Resemblance a Family Resemblance?' (1969) 78 Mind 408, 413.

My thesis is concerned with remedies that can be considered paradigmatic to positive duties because they exemplify those similarities which are shared—to varying degrees—by all such remedies. As its 'nuclear members',[80] these paradigm remedies are representative of the family of positive duties and so offer a convenient shorthand for referencing the set of resemblances that would emerge when viewing an 'extended family portrait' of remedies for breaches of positive duties.

Paradigm cases rely on analogical reasoning in order for resemblances between particular examples to be identified as family resemblances.[81] Drawing on Aristotle's work on the epistemological problem of paradigms, Agamben observes that the paradigm is closely related to analogy: reasoning does not move from the universal to the particular (deduction), nor from the particular to the universal (induction), but rather from the particular to the particular.[82] Paradigms therefore rely on the recognition of similarities between particular examples that is so familiar to the analogical reasoning of the common law.[83] Instead of yielding logically conclusive answers, paradigms are 'depolar rather than dichotomic', 'tensional rather than oppositional'.[84] It is in this tension between particulars that the explanatory power of the paradigm lies—it is a singular example which, in showing itself as such, reveals 'a new analogical context, a

[80] ibid 416.

[81] Note that Wittgenstein did not imply that all terms are family resemblance terms, but he does suggest that 'consideration of family resemblance terms might alert us to the wider fact that all general terms are analogical structures'. Sluga (n 78) 13.

[82] Giorgio Agamben, 'What Is a Paradigm?' (European Graduate School, August 2002) 4 <www.maxvanmanen.com/files/2014/03/Agamben-What-is-a-paradigm1.pdf> accessed 3 September 2018.

[83] Grant Lamond, 'Precedent and Analogy in Legal Reasoning', *The Stanford Encyclopaedia of Philosophy* (Spring edn, 2016) <https://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/> accessed 3 September 2018.

[84] Agamben (n 82) 4.

new generality'.[85] A paradigm case is therefore an example which both defines and makes intelligible the set of phenomena to which it belongs.[86] This illuminating potential is reflected in the etymological meaning of the Greek *paradigme*, literally meaning 'what shows itself beside'.[87] Using the language of family resemblances, we can say that a paradigm case does not merely constitute the set of similarities shared by particular examples, but in fact shows these similarities to be *family* resemblances by illuminating a set of particulars as a new family.

II. The Paradigm Remedial Puzzle Posed by Positive Duties

Transposing the insights of Chayes and Roach to the vantage point of positive duties, this chapter has identified the distinctive features shared by remedies for breaches of positive duties. These features are best characterised as family resemblances rather than exclusive features set in binary opposition to remedies for breaches of negative duties. I further argued that by focusing on a paradigm case, we mute the distracting dissonances between particular examples and instead amplify the consonant features that resonate through a whole family of remedies. Thomas Kuhn's work explains how paradigms enable us to identify new contexts and shifts in remedial practice, an insight that finds application in Chayes' juxtaposition of two models of adjudication to illuminate the emergence of public law litigation as a new and distinct paradigm. Concerned with the remedial paradigm shift that this involves, my thesis considers how courts can exercise

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85 ibid.

86 ibid 3. Agamben uses Foucault's Panopticon to explain how a paradigm case, as a concrete, singular phenomenon, can both constitute and make intelligible a more general model of functioning, namely 'panopticism' as a mechanism of power.

87 ibid 4.

their discretionary remedial power to respond to the remedial challenges posed by positive duties. To exemplify these remedial challenges that my thesis addresses, this section sets out the 'paradigm remedial puzzle' posed by positive duties. These challenges arise from the family resemblances shared by remedies for breaches of positive duties, and so are familiar given their overlap with socio-economic rights and public law litigation as discussed above. I group these remedial challenges under two broad headings—ascertaining systemic relief and promoting accountability for compliance—as this structure anticipates my evaluation of the remedial innovations featured in the case studies covered in Chapter Five and Chapter Six.

A. Ascertaining Systemic Relief

The breach of a positive duty does not generate any 'ready-made' remedy, but must instead be ascertained through polycentric decisions about complex systemic issues that can have far-reaching budgetary implications and distributive knock-on effects. This remedial challenge is frequently captured with reference to the concept of 'polycentricity', which describes issues that are distinctive for their complexity and contingency on a network of related factors and problems.[88] There are many subsidiary centres (hence 'polycentric') of intersection and interaction in this network, such that the solution to one problem affects all the others.[89] Paradigmatically polycentric problems concern distributive decisions, such as the allocation of scarce resources, that inevitably have consequences for a range of causally related issues and interests. Fuller's well-known analogy of the spider's web tries to capture this potential of polycentric

[88] Fuller (n 33). Fuller's concept of 'polycentricity' is derived from Michael Polanyi's work: Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (UCP 1951).

[89] Fuller (n 33) 395.

decision-making to result in unforeseen, indirect and often unintended consequences—if one pulls a single thread, the distribution of tensions within the entire web is affected in ways often difficult to predict.[90]

While polycentricity pervades all adjudication to some extent,[91] the potential pitfalls of polycentric decision-making are most pronounced when ascertaining systemic relief, as this is essentially the problem-solving phase of litigation where the court's remedial order—and thus also its consequences—take effect. The high degree of polycentricity in this remedial context is a function of the 'number and diversity of interests implicated, and the depth and breadth of the impact'.[92] The forward-looking nature of positive duties makes it especially difficult to predict the trade-offs and knock-on effects of distributive decisions, thus introducing an added dimension of contingency to the implementation of remedial orders as discussed below. Moreover, in making these distributive decisions, the court may suffer from an information deficit that strains its capacity to fully grasp the complexity of the polycentric problem at hand. In exercising their discretionary remedial power, courts need to navigate through, not bypass, the complexities of these multivalent problems. A relevant distinction to be drawn in this regard is between instances where the court actually makes a polycentric decision, such as dictating an exact budgetary allocation, and instances where the court enforces the state's positive duty to make a polycentric decision, such as setting constitutional criteria that must be satisfied in setting a budget.[93]

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[90] ibid.

[91] Jeff King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101.

[92] Jeff King, *Judging Social Rights* (CUP 2012) 202.

[93] This distinction underlies the split on the New York Court of Appeals in *Campaign for Fiscal Equity v State of New York* 8 NY3d 14 (NY 2006) (*CFE IIIc*). See Chapter Five, Section V.

Secondly, and relatedly, the formulation of systemic relief draws in the involvement of multiple actors for the reform of complex organisational structures. The polycentricity that is paradigmatic to remedying breaches of positive duties does not only risk an information deficit but also a representation deficit, as the 'substantial and heterogeneous interests of a large number of unrepresented persons' are implicated.[94] This can create tensions when ascertaining systemic relief as the interests of individual litigants before the court may run contrary to the systemic interests of similarly situated rights-holders, requiring the court to be responsive to the broader context in which litigation unfolds.[95] However, the adversarial process does not capture the multiplicity of voices needed to fully represent these interests and does not generate 'the kinds of predictive social informational materials that necessarily underlie systemic relief'.[96] The court may therefore broaden participation in remedial formulation as a way to gather and apply the relevant contextual information, with a court-appointed official sometimes charged with overseeing the process of remedial formulation.[97]

Multiple actors beyond the parties may therefore be engaged in a court-facilitated process of remedial negotiation and formulation. Fletcher has argued that the court's solicitation of remedial plans from the parties mimics Polanyi's method of mutual spontaneous adjustment as the best way for polycentric problems to be resolved.[98] The parties negotiating and formulating a remedial plan are 'rather like the bees in a hive finding their appropriate space and function by their sense of the bees around them, with

[94] King (n 92) 210.

[95] Liebenberg (n 55) 379.

[96] Buckholz and others (n 45) 793.

[97] ibid 796–812; Chayes (n 15) 1300–1301; Sturm (n 66) 1371–1373.

[98] William A Fletcher, 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1981) 91 Yale Law Journal 635, 647; Polanyi (n 88) 154–200.

each bee individually adjusting to its neighbors, and each neighboring bee in turn adjusting to the others' adjustment until a stable equilibrium in reached'.[99] The analogy is somewhat distorted by two factors. Firstly, not all parties who might be affected by the resulting systemic relief can practically be involved in remedial formulation. Secondly, and more pertinently for our purposes, the court can exercise discretion to impose a remedy where the parties either fail to reach agreement on a plan or produce a inadequate plan that does not provide just and equitable relief.[100] This retention of discretion is the reason Diver has likened this process of remedial formulation to a bargaining game with the judge being a political powerbroker.[101] The key implication of this multi-party, dynamic process of remedial formulation is a diversification of the court's involvement in the remedial phase.[102] As we shall explore in Chapter Three, the exercise of discretionary remedial power may take a range of forms, from approving a remedial plan reached through settlement to initiating or imposing a remedial plan not proposed by any of the parties.

B. Promoting Accountability for Compliance

The forward-looking nature of positive duties poses a challenge to securing compliance because the implementation of systemic relief is subject to a range of temporal, contextual and institutional contingencies. Most obviously, compliance is contingent on positive steps being taken by those responsible for implementing systemic relief. This

[99] Fletcher (n 98) 647.

[100] ibid 653.

[101] Colin S Diver, 'The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions' (1979) 65 Virginia Law Review 43.

[102] Buckholz and others (n 45) 815–816.

paradigmatically takes the form of a remedial plan to be implemented in stages rather than any once-off intervention. Furthermore, remedial fact-finding is prospective, involving hypothetical conjecture about what remedial interventions will bring the target organization into constitutional compliance.[103] The remedial plan must therefore be flexible enough to adapt to changing circumstances and the unforeseen obstacles that may thwart compliance. It cannot be a 'static, comprehensive blueprint' but should rather serve as a provisional and 'evolving guide' that is refined and recalibrated in response to the contingencies of implementation.[104] The paradigm remedial puzzle posed by positive duties is therefore an implementation process that is 'an incremental, cyclical process of small steps, each followed by assessment or reaction and further readjustment'.[105]

Contending with these contingencies in implementation requires a dynamic use of remedial mode to promote accountability for compliance. I use the term 'remedial mode' to refer to the institutional 'posture' or 'stance' that the court adopts towards the government to coerce or induce compliance with its remedial orders. A distinction can be drawn in this regard between the 'command-and-control' remedial mode and a more reflexive remedial mode that uses deliberative and experimental strategies to incentivise compliance. A one-dimensionally coercive order, which is the staple command-and-control mode of the law, is incompatible with the flexibility that is needed for the implementation of systemic relief.[106] Instead, a reflexive remedial mode may be needed to induce compliance through more experimental interventions involving deliberative and

[103] Sturm (n 66) 1364.

[104] Diver (n 101) 63–64; Sabel and Simon (n 39) 1019; Buckholz and others (n 45) 817–821.

[105] Diver (n 101) 63.

[106] For further description of the command-and-control mode, see Sabel and Simon (n 39) 1021–1022.

co-operative problem-solving.[107] Reflexivity is more nuanced than a dialogic approach, which seeks to build partnership and co-operation between the judiciary and other branches of government.[108] Perhaps the best illustration of a dialogic device is the suspended declaration of invalidity, which is used extensively in Canada and increasingly in South Africa as a deferent and restrained exercise of remedial power that entrusts remedial formulation to the other branches of government.[109] A reflexive remedial mode does not rely on a show of deference to encourage co-operation, but rather uses deliberative strategies to incentivise and induce compliance. The remedial challenge for courts is to use remedial mode in a dynamic way that is responsive to the underlying reasons for the systemic breach of the state's positive duty. While a coercive dimension may be strategically valuable in prompting compliance, especially where there is government intransigence, this can be complemented by more reflexive techniques to strike the right balance between incentives and sanctions.

The importance of a dynamic use of remedial mode to promote compliance resonates with Sabel and Simon's account of the shift away from command-and-control injunctive regulation that dominated at the time Chayes was writing towards more experimentalist intervention in recent public law litigation.[110] Rejecting 'top-down, fixed rule regimes', the experimentalist approach accommodates contingencies in

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107 See generally, Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law and Society Review 239; Sabel and Simon (n 39).

108 Roach (n 48) 52.

109 Robert Leckey has recently challenged the prevailing view of suspended declarations of invalidity as a restrained and deferential exercise of remedial discretion by identifying their potential to harm rights-holders and undermine the rule of law: Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14 International Journal of Constitutional Law 584. His critique also holds important implications for constitutional theory more generally, as he argues that suspended declarations of invalidity require us to rethink our understanding of constitutional supremacy: 'It becomes untenable to claim that the invalidity of legislation flows directly from the "operation" of the constitution's supremacy clause, rather than from an exercise of judicial discretion.' ibid 603.

110 Sabel and Simon (n 39) 1019.

implementation by combining 'more flexible and provisional norms' with 'procedures for ongoing stakeholder negotiation, continuously revised performance measures and transparency'.[111] Most importantly for our purposes, their account highlights the way that experimentalist intervention targets the political blockages in public institutions that have chronically failed to meet their positive duties, with top officials often conceding as much.[112] Drawing on Unger's concept of 'destabilisation rights', Sabel and Simon argue that such experimentalist interventions seek to unsettle and break open these public institutions 'that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage'.[113] This destabilisation promotes accountability for compliance by 'induc[ing] the institution to reform itself in a process in which it must respond to previously excluded stakeholders'.[114] Deliberative remedial strategies, like 'meaningful engagement' as developed in a series of South African eviction cases illustrate the destabilising effects of the court's remedial intervention.[115]

Deliberative remedial strategies and procedures for ongoing stakeholder involvement gesture towards the further remedial challenge that compliance can only be secured through the sustained co-operation of multiple actors through the implementation process. The implementation of systemic relief therefore mirrors the

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[111] ibid 1016, 1019.

[112] ibid 1062–1063. This is vividly demonstrated by both case studies in Part II.

[113] Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (CUP 1987) 530.

[114] Sabel and Simon (n 39) 1056.

[115] For a sense of the casuistic development of 'meaningful engagement', see the following South African Constitutional Court jurisprudence: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

collaborative process of remedial formulation, with multi-party participation at both stages enhancing accountability for compliance. Susan Sturm eloquently captures this challenge of securing the co-operation of multiple parties for successful implementation in the context of public law litigation:

> The remedy may also affect the lives of individuals or groups who have no legal entitlement concerning the remedy but are in a position to block or disrupt its implementation. Unlike the process of liability determination, the remedy's successful implementation depends on the cooperation of these diverse actors. Thus the remedial stage poses the challenge of achieving the understanding and acceptance of the remedy by those who must live with it. The process is further complicated by the fact that the state and local officials, who have political and legal concerns about preserving their decision-making authority are frequently the target of the court's intervention.[116]

This underscores the value of a reflexive remedial mode that leverages incentives to induce compliance rather than coercive orders which may jeopardise continued cooperation because, as Fredman observes, 'judges can only make good the inactivity of government with the compliance of the same government'.[117] Beyond the target institution itself, implementation may draw in civil society organisations, individual rights-holders and a range of other stakeholders.

Finally, the contingent, reflexive and collaborative process of implementing systemic relief calls for sustained judicial involvement. The retention of supervisory jurisdiction promotes accountability by enabling the parties to return to court without instituting fresh litigation in the event of non-compliance. This procedural function also has the '"important symbolic effect" [of] interject[ing] a continued judicial presence in the affairs of the defendant that detracts from the defendant's sense of institutional autonomy'.[118] This background presence is therefore the foundation of the court's

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[116] Sturm (n 66) 1364–1365.

[117] Fredman (n 55) 133.

[118] Buckholz and others (n 45) 817.

‘accountability-reinforcing role’.[119] However, supervisory jurisdiction also enables the court to engage in a more active oversight role during implementation to fulfil three important remedial functions. First, implementation may entail the prolonged and resource-intensive *administration* of systemic relief, such as the processing of large numbers of individual claims in a class action. Second, implementation needs to be subject to *monitoring* so that progress can be assessed and the remedial plan adjusted accordingly.[120] Third, *reporting* requirements can enhance transparency and accountability where there is a need for robust supervision over deadlines for implementing systemic relief. Because the challenge of achieving full compliance is multi-faceted, the court’s continued involvement in the implementation of systemic relief is similarly multi-faceted.[121]

Where these challenges of administration, monitoring and reporting strain the resources, capacity or competence of the court, it may rely on the parties, court-appointed officials or even civil society to assist with these supervisory functions. Public law litigation in the United States has led the way in the use of court-appointed officials to administer and supervise the implementation of systemic relief. Courts have drawn on a diversity of specialist functions in the form of special masters, monitors, mediators, administrators and receivers.[122] Other jurisdictions have drawn inspiration from the US example, as demonstrated by the appointment of an independent auditor in *Madzodzo*[123] and a claims administrator in *Linkside*[124] that are the subject of my South

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119 Sabel and Simon (n 39) 190.

120 Buckholz and others (n 45) 817–821.

121 ibid 816.

122 ibid 824–837.

123 *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

124 *Linkside and Others v Minister for Basic Education and Others* [2015] ZAECGHC 36.

African case study in Chapter Six. India has seen a similar shift away from a court-centred approach to supervising the implementation of systemic relief. The ongoing public interest litigation on the right to food is a noteworthy example of a truly collaborative approach to implementation. Beginning with the landmark interlocutory decision of *People's Union for Civil Liberties v Union of India*,[125] the Supreme Court's active and sustained involvement in the implementation of its orders has been 'both a response to and a catalyst for a well-organized, grass-roots activist campaign of fact-finding, compliance monitoring, and strategic litigation'.[126] While so-called 'umbrella orders' set out the lines of accountability for the implementation of its interim orders, the Court relies heavily on non-judicial mechanisms for promoting accountability for compliance. Court-appointed commissioners are assisted by a network of state-level advisors to monitor progress with the implementation of systemic relief and resolve disagreements with the government through deliberation.[127] A similarly collaborative approach to implementation is being followed in the current case of *Registrar (Judicial) of High Court of Karnataka v State of Karnataka and Ors*,[128] a public interest petition initiated by the Karnataka High Court in response to a newspaper report claiming that nearly 50,000 children across the state were out of school.[129] The High Court first initiatied a survey to ascertain the actual number of out-of-school children (which was in fact closer to 170,000) and then set up a High Powered Committee, which includes government

[125] *People's Union for Civil Liberties v Union of India* (n 73).

[126] Fredman (n 55) 131.

[127] ibid 131–132; Lauren Birchfield and Jessica Corsi, 'Between Starvation and Globalization: Realizing the Right to Food in India' (2010) 31 Michigan Journal of International Law 691.

[128] *Registrar (Judicial) of High Court of Karnataka v State of Karnataka and Ors* Writ Petition 15768 of 2013.

[129] See Jayna Kothari and Gaurav Mukherjee, 'The Out of School Children Case: A Model for Court-Facilitated Dialogue?' (OxHRH Blog, 18 September 2015) <http://ohrh.law.ox.ac.uk/the-out-of-school-children-case-a-model-for-court-facilitated-dialogue/> accessed on 22 September 2019.

representatives, civil society organisations and lawyers involved in the litigation, who are tasked with finding solutions to the challenge of out-of-school children.[130]

C. The Remedial Process: The Continuity Between Remedy and Enforcement

The remedial challenges outlined above reveal many continuities between the formulation of a remedy and its implementation, as 'the court faces the task of crafting both the process and the substance of the remedy'.[131] The polycentric and collaborative task of ascertaining systemic relief requires an implementation process that is responsive to contingencies, strategically reflexive and co-operative. This means that the formulation of a remedy is seldom a discrete activity but is rather absorbed within a longer remedial process, continuously subject to revision as it unfolds through implementation. The term 'remedial process' is used in this thesis to reflect this continuity between remedy and enforcement. While conceptually distinct, the court's task of crafting a remedy and its task of ensuring its enforcement are closely connected as part of an 'ongoing remedial regime' in which the substantive content of the remedy is shaped and refined by the process for its enforcement.[132] The term 'remedial process' also captures the lengthening and diversification of the court's involvement in remedying breaches of the state's positive duties. In Chapter Three, I develop this account of the court's exercise of

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130 See further Ann Skelton, *Strategic Litigation Impacts: Equal Access to Quality Education* (Open Society Foundations 2017) 44; Faranaaz Veriava and Ann Skelton, 'The Right to Basic Education: A Comparative Study of the United States, India and Brazil' (2019) 35 South African Journal on Human Rights 1.

131 Sturm (n 66) 1364.

132 Buckholz and others (n 45) 813–814.

discretionary remedial power as taking a range of forms that are more diverse and complex than simply the choice of a 'one-shot' remedy.[133]

This continuity between remedy and enforcement unsettles the relationship between rights and remedies as systemic relief does not come ready-made, but rather needs to be ascertained and refined through an iterative remedial process. For this reason, Sabel and Simon observe that '[t]he feature of Chayesian public law litigation that has most troubled legal analysis is the relation of right and remedy'.[134] The length, complexity and contingency of the remedial process creates a risk that the remedy will become dislocated from the right, opening up a normative gap between the two because the implementation of systemic relief falls short of the normative commitment embodied by the right. Paul Gerwitz's work grapples with this remedial 'jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy'.[135] Reflecting on the implementation difficulties that made compliance with the desegregation decrees in *Brown* so hard to secure, Gerwitz reflects on 'whether and how the law should adjust its remedial aspiration in the face of a resistant reality'.[136] In a similar spirit, the paradigmatic remedial process for enforcing positive duties prompts us to consider the ways in which the remedial challenges described above may affect our conception of rights. The next section of this chapter seeks to do this by exploring the conceptual relationship between rights and remedies, before drawing out the implications of their interdependence for the court's exercise of discretionary remedial power to enforce the state's positive duties.

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133 See Chapter Three, Section V.

134 Sabel and Simon (n 39) 1053.

135 Paul Gerwitz, 'Remedies and Resistance' (1983) 92 Yale Law Journal 585, 587.

136 ibid.

III. The Relationship Between Rights and Remedies

The first part of this chapter established the flexibility of the right-remedy interlock as a key feature of the remedial paradigm of positive duties. The diversity and complexity of remedial possibilities for enforcing positive duties underscores the centrality of discretionary remedial power in mediating the relationship between rights and remedies.[137] By granting one particular remedy from a wide range of remedial permutations, the court's exercise of discretion reflects a certain conception of the way that rights and remedies relate or interact. Drawing on the conceptual taxonomy developed by Daryl Levinson,[138] I outline three ways to conceive of the relationship between rights and remedies: (1) the radical disjuncture between rights and remedies implicit in 'rights essentialism'; (2) the exact equivalence presumed by a conflation of rights and remedies; or (3) the reciprocity between rights and remedies envisaged by 'remedial equilibration'.[139] I expose the first two conceptions as misguided extremes that do not account for the flexibility and interdependence that characterises the dynamic between rights and remedies. The value of remedial equilibration lies in its recognition of the formative function of remedies in constituting and concretising rights, and thus also the central role of discretion in mediating their relationship. Remedial equilibration opens up a fuller appreciation of the importance of remedies for the full realisation of rights,

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[137] The *relationship* between rights and remedies, as conceptualised here, is not to be confused with what I describe as the *right-remedy interlock*, although the two are related. The latter refers to the conceptual 'fit' between rights and remedies, with a 'tight' interlock implying the remedy can be logically derived from the breach and a 'flexible' interlock implying that there is an 'openness' or range of remedial possibilities for fulfilling the right at stake. The more 'flexible' the interlock, the more scope there is for the kind of reciprocity in the relationship between rights and remedies that I discuss in this section.

[138] Levinson (n 14).

[139] Bishop and Cooper-Stephenson also outline three conceptions of the right-remedy relationship. See Michael Bishop, 'Remedies', *Constitutional Law of South Africa*, vol 1 (2nd edn, Juta 2014) 19–23; Ken Cooper-Stephenson, 'Principle and Pragmatism in the Law of Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991).

especially in the face of the seemingly intractable remedial challenges posed by positive duties.

A. The Fiction of Rights Essentialism

Daryl Levinson begins his account with a description of what he identifies as the prevailing conceptualisation of the right-remedy relationship in American constitutional discourse. He uses the term 'rights essentialism' to describe this dominant approach. Rights essentialism is premised on a radical disjuncture between rights and remedies—rights are thought to be neatly severable from remedies and, importantly, far superior.[140] Peter Schuck's contemplation on the right-remedy relationship is a striking sample of rights essentialist thinking:

> Most public law rights are...conceived in abstract aspiration; they are expressed in the uncompromising, unconditional language of absolute entitlement, a visionary vocabulary purified of limiting, qualifying, or prudential impurities. Although often turning upon highly specific factual determinations, these rights invoke juridical relationships and claims based upon general norms. Indeed, precisely because these rights are based upon universalizing principles, being available to anyone who meets prescribed conditions, they enjoy a distinctive moral status. In contrast, remedies are highly particularized, requiring specific defendants to discharge certain obligations to specific plaintiffs and thus giving rights palpable, substantive meaning. Remedies are rooted in the here-and-now, rights in the world-to-be. Rights condemn the status quo and are invoked to initiate its transformation; remedies mobilize the status quo in order to complete it. Rights preoccupy Don Quixote; remedies are the work of a Sancho Panza.[141]

On the rights essentialist view, rights exist in the exalted realm of the ideal, embodying 'pure' constitutional values that are defined by courts.[142] Remedies are relegated to the realm of concrete, contingent reality, serving as the operational rules by which the other branches of government can 'translate' rights into practice.[143] A remedy is considered an

140 Levinson (n 14) 858.

141 Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (YUP 1983) 27.

142 Levinson (n 14) 858.

143 ibid 858, 861.

imperfect realization of the right, a distortion or dilution of an abstract ideal, such that rights are thought to be best understood without any consideration for how they might be implemented through a remedial process.[144] A strict separation between rights and remedies, and a privileging of the former over the latter, is therefore definitive of rights essentialism.

Although the priorities that exemplify rights essentialism may not be explicitly championed in such blatant terms by US courts and academics, Levinson argues that it is the conception of the right-remedy relationship that is most pervasive in American constitutional discourse. The strict separation between rights and remedies is, in Sager's words, 'part of the intellectual fabric of constitutional law and its jurisprudence'.[145] However, Levinson argues that 'rights essentialism' is predominantly a feature of American constitutional *discourse* rather than actual constitutional *practice*, due to the strategically important rhetorical role that 'rights essentialism' performs in maintaining the legitimacy of constitutional rights and judicial review in the United States.[146] This is because its stark distinction between rights and remedies places courts in a privileged position to constitutionally entrenched values and is thought to remove them from the fray of policy-making and practical implementation that characterises the 'political' branches of government.[147] The appeal of 'rights essentialism' therefore lies in its neat institutional division of constitutional labour which aligns easily with a traditional understanding of the separation of powers whereby courts confine themselves to defining abstract constitutional principles and the other branches of government are left

[144] ibid 858.

[145] Lawrence Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 Harvard Law Review 1212, 1213.

[146] Levinson (n 14) 858.

[147] ibid 857–858.

to implement or operationalise these principles as they see fit.[148] The legitimising function of rights essentialist discourse is conceded by Peter Schuck's observation that, '[a]lthough the reality of rights often belies their promise, the absolute quality of rights-talk still generates great rhetorical power'.[149]

The dominance of rights essentialist rhetoric may be a peculiarity of American constitutional discourse, but the radical disjuncture between rights and remedies it presupposes is prevalent in other legal systems. Michael Bishop notes in his authoritative treatise on constitutional remedies that rights essentialism is 'the pre-eminent view in South African constitutional law'.[150] The aspirational impulse of South Africa's 'transformative constitutionalism'[151] has perhaps allowed a rights essentialist discourse to thrive, as illustrated by Kriegler J's characterisation of the court's remedial function in *Fose* as an 'attempt to synchronise the real world with the ideal construct of a constitutional world'.[152] A rights-based constitutionalism that seeks to achieve 'large-scale social change through non-violent political processes grounded in law'[153] should, however, be acutely aware of the formative role of remedies in concretising and constituting rights.

In spite of the prevalence of rights essentialism in constitutional discourse, Levinson argues that it does not provide an accurate description of actual constitutional

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148 ibid 914.

149 Schuck (n 141) 27.

150 Bishop (n 139) 20.

151 Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal of Human Rights 146.

152 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [94].

153 Klare (n 151) 150.

practice.[154] While an insistence that the 'unity of right and remedy fractures on the hard rocks of implementation'[155] legitimises the privileged position of courts as the guardians of abstract constitutional ideals, this rights essentialist discourse is a fiction that expediently denies the more complex constitutional reality. Levinson exposes this descriptive gap between constitutional discourse and practice by illuminating the ways in which remedies shape and influence rights, as reflected in the discussion of remedial equilibration below. Indeed, to recall the words of Lord Holt CJ in *Ashby v White*, 'it is a vain thing to imagine a right without a remedy'.[156]

B. The Straightjacket of Right-Remedy Conflation

Before moving on to present a more accurate characterisation of the right-remedy interaction, it is worth briefly considering the other extreme to 'rights essentialism', namely a conception of rights and remedies as coterminous, even indistinguishable. The legal realists have often been (fairly or unfairly) accused of conflating the distinction between rights and remedies, due to their emphasis on the real-life outcomes and effects of the law rather than its purported or hypothetical aims.[157] Karl Llewellyn's conceptualisation of the relationship between rights and remedies is an example of an inflexible approach which conflates rights and remedies: 'Absence of remedy is absence of right. Defect of remedy is defect of right. A right is as big, precisely, as what the

154 Levinson (n 14) 862.

155 Schuck (n 141) 26.

156 *Ashby v White* (n 4).

157 Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (OUP 2013) 150.

courts will do'.[158] Such a conflation of rights and remedies is just as misleading as 'rights essentialism' because it obscures their differences of both form and substance. Rights and remedies are conceptually distinct even where the relief obtained can be substantively equated with the entitlement due in terms of the right. David Haljan explains this formal distinction as follows:

> The right and its breach are logically antecedent and separate from the remedy. A remedy is thus the object of a logically prior entitlement but one separate from the right itself. It cannot be the entitlement itself since the remedy must be applied from outside that right so as to restore, or enforce, the right. Nor can it be the object of the prior entitlement, because the fact of a breach (of the right) implies that the objective of the right has been frustrated. And no right reasonably and logically intends its own breach, its own frustration of purpose.[159]

In short, the simple fact that remedies necessarily *follow* the breach of a right implies a formal distinction. A remedy aims to vindicate a right *ex post facto*, not to substitute or replace a right *ex ante*.[160]

More importantly for purposes of my argument, however, there are two main reasons why a right-remedy conflation does not account for the distinction in substance between rights and remedies. Firstly, it fails to recognise the possibility that a variety of different remedies could address the violation of a particular right, or that a remedy might not vindicate the full scope of that right. A remedy is always a contextualised response in the sense that it grows out of a particular case that is brought before the court. In a similar vein, Sabel and Simon have lamented the 'crude positivism' of right-remedy conflation as being even less satisfactory than the rights essentialist 'exaltation of rights [because] it ignores that the remedy arises from a relative effort to

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[158] Llewellyn (n 61) 83–84.

[159] David Haljan, *Constitutionalising Secession* (Hart 2014) 132.

[160] Kate Hofmeyr characterises the exercise of discretionary remedial power as 'doubly responsive': not only must a court wait for a case to be brought before it, but judges may only exercise remedial power when a rights violation has been established. Hofmeyr (n 2) 532.

give meaning to the right'.[161] By its very nature, a remedy attempts to provide relief to a concrete situation and needs to be tailored to that specific context if it is to effectively vindicate the right that was violated. It follows that a remedy might not attempt to vindicate or realise a right in its entirety, but only that aspect of it which was violated in the case before the court. A remedy is 'an elaboration of the right in question', not its exact equivalent.[162]

Secondly, a conflation of rights and remedies misconceives the institutional dynamic of adjudication by overlooking the flexibility that is inherent in a court's engagement with the remedial process. While the violation of a right demands remedial relief in some form, there is seldom, if ever, only one possible remedial response that could vindicate the right at stake, especially in relation to positive duties. On the contrary, courts enjoy broad remedial discretion, which is particularly important where the state has failed to fulfil rights due to the likelihood of an extended remedial process in which the court is constantly required to evaluate progress and recalibrate the court order accordingly. While rights essentialism diminishes the significance of remedial discretion by characterising remedies as 'a technical effort to execute an already defined norm', thus acknowledging only a one-way causality running from rights to remedies, a conflation of rights and remedies denies the role of discretion altogether by allowing rights to be wholly defined by their remedial instantiation.[163]

C. The Flexibility and Interdependence of Remedial Equilibration

161 Sabel and Simon (n 39) 1055.

162 ibid.

163 ibid. See further Bishop (n 139) 20.

These objections to a conflation of rights and remedies gestures towards a need for some measure of flexibility in our conceptualisation of their relationship, yet the fallacy of 'rights essentialism' warns us against a complete dislocation of remedies from rights. Daryl Levinson advocates a more nuanced conception of the right-remedy relationship, which he calls 'remedial equilibration', to capture the flexibility and interdependence that characterises the dynamic between rights and remedies. Rejecting the facile characterisation of rights as neatly sealed off principles that exist independently from remedies, 'remedial equilibration' recognises the formative function of remedies in constituting and concretising rights. On this view, the central characteristic of the right-remedy interaction is reciprocity: rights and remedies are conceived as interdependent and mutually determining.[164] Remedies are not merely the 'handmaidens of rights' because they influence both the content and value of rights.[165] In contrast to the exclusively 'top-down' approach of rights essentialism which only recognises the causality running from right to remedy, 'remedial equilibration' insists we recognise the extent to which rights are built 'bottom up' through the remedial process. Causality runs *both* ways: rights are formative in determining remedies for their breach, but remedial concerns and consequences also penetrate our understanding of rights. Remedial equilibration therefore exposes the fallacy of the rights essentialist separation of '[p]ure rights, dirty remedies'.[166]

Remedial equilibration does not diminish the importance or primacy of rights, but rather seeks to present a more accurate descriptive account of the reciprocal interaction

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[164] Levinson (n 14) 884.

[165] Bishop (n 139) 7 fn 2.

[166] Gerwitz (n 135) 678.

between rights and remedies.[167] Levinson describes this reciprocal dynamic as 'the permeability of the conceptual membrane separating rights from remedies'.[168] Using a similar metaphor, Gerwitz brilliantly captures how remedial realities intrude on our understanding of rights:

> All dimensions of the law are affected by the world of the practical, the real, the subjective, the political—in short, 'the world' as we know it. The duality of the ideal and the real exists, but it pervades the judicial function. The two-sidedness is not conveniently deposited into the separate categories of right and remedy. The practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely 'ideal'. There is a permeable wall between rights and remedies: The prospect of actualizing rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.[169]

This passage, which could easily serve as the creed of remedial equilibration, highlights the crucial role that remedial discretion plays in controlling what can pass through the 'permeable wall'[170] or 'conceptual membrane'[171] between rights and remedies. The exercise of discretion mediates both how the normative content of rights influences the form of remedial relief and how remedial concerns and consequences infiltrate our understanding of rights.

Levinson argues that this symbiotic relationship between remedies and rights can be most clearly discerned in the context of structural reform litigation, where 'rights and remedies are redefined in an iterated process that often stretches out over a number of years in an effort to achieve concrete change in public institutions'.[172] The CFE litigation,

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[167] Remedial equilibration is not only a descriptively accurate account of constitutional practice in the US, as it finds application further afield. For example, Bishop observes in relation to the South African context that 'remedial equilibration is generally the best explanation for the Constitutional Court's action and that the accumulation of cases strongly suggests the validity of the equilibration thesis': see Bishop (n 139) 23.

[168] Levinson (n 14) 939.

[169] Gerwitz (n 135) 678–679.

[170] ibid 678.

[171] Levinson (n 14) 939.

[172] ibid 874. Levinson makes this argument using the three examples of school desegregation, prison conditions, and the apportionment of electoral districts in the US.

with its thirteen-year lifespan and extended remedial process, is a good illustration of the way that remedial concerns influence our understanding of rights.[173] Each time the issue of remedial relief was raised in the Court of Appeals, the meaning of a 'sound basic education' was fleshed out in greater detail and the scope of the State's obligations was more precisely articulated. The public interest litigation on the right to food in India is an even more striking demonstration of Levinson's point, as the Indian Supreme Court's continued use of interim remedies over many years—indeed, indefinitely—has served to incrementally define and refine the content of the right to food.[174] The very nature and scope of the right to food in India has been the product of this iterative process of successive interim remedies.

Levinson organises right-remedy relationships into a typology of forms of remedial equilibration, which is a helpful way of identifying and explaining more concretely how remedies shape rights, and *vice versa*.[175] Firstly, the significance of remedies is borne out by the fact that rights are often shaped by the form of remedial relief that is likely to follow if the right is violated.[176] To prevent undesirable remedial implications, the court may define the right at stake so as to prevent those consequences from materialising—what Levinson calls 'remedial deterrence'.[177] A clear example of this can be found in the famous South African case of *Republic of South Africa v Grootboom*, where the Constitutional Court was careful to clarify that section 26 of the Constitution does not

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[173] *Campaign for Fiscal Equity v State of New York* 86 NY2d 307 (NY 1995) (*CFE Ic*); *Campaign for Fiscal Equity v State of New York* 100 NY2d 893 (NY 2003) (*CFE IIc*); *Campaign for Fiscal Equity v State of New York* 8 NY3d 14 (NY 2006) (*CFE IIIc*).

[174] *People's Union for Civil Liberties v Union of India* (n 73).

[175] In an excellent doctrinal application of Levinson's insights to South African constitutional jurisprudence, Bishop elaborates on this typology by identifying six types of right-remedy interactions under remedial equilibration. See Bishop (n 139) 24–39.

[176] Levinson (n 14) 884.

[177] ibid 885.

constitute an entitlement to claim 'housing immediately upon demand', because that would give rise to problematic remedial implications both inappropriate for the Court to order and, more obviously, impossible for the government to comply with in practice.[178] Rather, the Court emphasised that the right in section 26 was one of *access* to adequate housing, thus obliging the state 'to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing'.[179] The significance of remedies in shaping rights is therefore closely linked to the institutional dynamic of adjudication—that is, what remedial role the court envisages for itself in the broader context of the separation of powers.

Secondly, Levinson points out that most or all rights incorporate, by definition, certain 'remedial' prophylactic rules.[180] By this Levinson means that the definition accorded to a right 'may effectively incorporate a remedy'.[181] A common example of remedial incorporation that Levinson draws on is that of 'one person, one vote' implicit in the right to vote.[182] The 'one person, one vote' rule is built into the definition of the right to vote as a kind of preventative injunction against the frustration of the will of the majority through malapportionment.[183]

The final form of remedial equilibration that Levinson identifies is 'remedial substantiation', which acknowledges that the 'cash value of any right is a function of the

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178 *Republic of South Africa v Grootboom* (1) SA 46 (CC) [95] (Yacoob J) (*Grootboom*).

179 ibid [99] (Yacoob J).

180 Levinson (n 14) 885. For an example of remedial incorporation from South African jurisprudence, see Bishop (n 139) 33–34 with reference to *Union of Refugee Women v The Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

181 ibid.

182 ibid 887.

183 ibid.

remedial consequences attached to its violation'.[184] While rights essentialism trades on the rhetorical currency of rights-talk to legitimise the judicial role,[185] remedial equilibration is more realistic about the fact that, 'for most practical purposes, remedies control the value of constitutional rights'.[186] This insight is particularly pertinent in the context of strategic litigation, as the kind of remedial relief likely to be granted if the claim is successful is a determining factor in deciding whether to litigate or not. In strategic litigation, the practical value of a right, from a litigator's point of view, amounts to what remedial relief the court will be willing to grant. This pragmatic dynamic of the right-remedy interaction allows the rights analysis to be influenced by the practical challenges and anticipated obstacles of the remedial process, and thus stands in stark contrast to the conceptual abstractions of 'rights essentialism'.

Levinson's conceptualisation of remedial equilibration helps us steer between the two misguided extremes of 'rights essentialism' and right-remedy conflation. Remedies are neither disjointed afterthoughts as rights essentialism would have it, nor are they simply 'convenient shorthand symbols for rights' as Llewellyn suggests.[187] Rather, remedies are constitutive features of rights, but they do not exhaustively define rights. Although interdependent, they are conceptually distinct and there may well be good institutional or practical reasons for why there is a gap between the particular remedy granted and the full scope and content of the right at stake.[188] The permeable wall between rights and remedies foregrounds the role of discretionary remedial power in

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[184] Levinson (n 14) 874.

[185] Schuck (n 141) 27.

[186] Levinson (n 14) 914.

[187] Dagan (n 157) 150.

[188] Gerwitz (n 135). My account of remedial principles as 'optimisation requirements' in Chapter Four deals with exactly this challenge.

controlling the value of rights given the inevitability that 'judges' minds will shuttle back and forth between right and remedy'.[189] Remedial equilibration underscores the importance of remedies for realising rights—their reciprocity means that rights and remedies are 'interwoven in the single fabric we call justice'.[190]

IV. The Importance of Remedies for Optimising Rights

Remedial equilibration has important implications for enforcing the state's positive duties in human rights. The first half of this chapter identified the family resemblances shared by remedies for breaches of positive duties in order to characterise the paradigm remedial puzzle that they pose for courts exercising discretionary remedial power. Section III established that remedial concerns and consequences affect rights in various ways, and pointed to the role that discretion plays in mediating the permeable wall between rights and remedies. This section brings remedial equilibration to bear on the remedial challenges associated with enforcing positive duties, yielding three key insights for purposes of my thesis. First, the remedial implications of positive duties are constitutive of rights and thus either constrict or expand our understanding of rights. Second, the inevitability that 'judges' minds will shuttle back and forth between right and remedy'[191] exposes the artificiality of a strict institutional division of constitutional labour between adjudication and enforcement. Third, partial compliance or non-compliance severely devalues a right. These insights underscore the importance of remedies for the full realisation of rights. Because positive duties require the fulfilment of rights, remedies

[189] ibid 679.

[190] Beverley McLachlin, 'Rights and Remedies - Remarks' in Kent Roach and Robert J Sharpe (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice 2010) 23.

[191] Gerwitz (n 135) 679.

for their breach can either optimise or diminish rights—the stakes are therefore high for the exercise of discretionary remedial power.

A. The Remedial Implications of Positive Duties as Constitutive of Rights

Remedial equilibration establishes the formative influence of remedial concerns and consequences on our understanding of rights. Given the remedial challenges posed by positive duties, remedial deterrence looms large as a risk that judges allow the undesirable remedial consequences of positive duties to constrain their interpretation of rights. The difficulties of ascertaining systemic relief and promoting accountability for compliance are remedial realities that bring home the central insight of remedial equilibration:

> [C]onstitutional rights do not spring into existence fully formed and self-contained, like Athena from the head of Zeus. Rather, rights are designed to work in the real world, which means that their shape will always be influenced by pragmatic concerns about implementation and enforcement.[192]

The remedial challenges posed by positive duties therefore make remedial deterrence a key dynamic in the exercise of discretionary remedial power. For this reason, Michael Bishop brands it 'the most worrying form of remedial equilibration'.[193] More positively, however, the enforcement of positive duties opens up the possibility for rights to be fully realised. While the discourse of rights essentialism is wilfully blind to the risk of remedial deterrence, an appreciation of the formative role of remedies in constituting rights liberates courts to tackle the remedial challenges posed by positive duties in a way that gives maximal effect to rights.

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[192] Levinson (n 14) 926.

[193] Bishop (n 139) 26.

B. The Artificiality of a Strict Institutional Division of Constitutional Labour

Remedial equilibration exposes the artificiality of a strict separation between the adjudication of rights and the enforcement of rights, and thus also resists a neat institutional division of labour between the courts and the political branches of government. Since rights are partially built 'bottom up' through the remedial process, there is no bright line between principle and policy (as is posited by rights essentialism) and thus courts must engage, whether to a greater or lesser extent, with the polycentric problems posed by breaches of positive duties. This insight lends support to the lengthening and diversification of the court's involvement in the remedial process for enforcing positive duties, as the continuity between remedy and enforcement relies on a multi-faceted judicial role. Admittedly, this takes some sticking power:

> [I]nstitutional difficulties in developing a suitable remedy may influence the court in its determination whether or not the right has been violated...[but] it cannot be allowed to loop back on itself to cannibalize rights when remedial answers seem inadequate. Courts have to thus approach the remedial question with equal courage and conviction as they apply to the question of rights and their limits. They have to push onward against their own institutional resistance and misgivings and provide the required remedy.[194]

At the same time, however, remedial equilibration recognises the role of discretion in facilitating a measure of flexibility in the relationship between rights and remedies so that courts can adjust their response according to the institutional dynamic of the particular case in dispute. This does not necessitate a retreat into deference when faced with government intransigence, but rather calls for the kind of experimental interventions and dynamic use of remedial mode discussed in Section II.

C. The Importance of Full Compliance for the Value of Rights

[194] Fitzgerald (n 35) 253.

Finally, remedial equilibration points to the importance of ensuring remedial orders are in fact implemented, because a failure to fully comply undermines the normative commitment embodied by a right. On a practical and immediate level, the absence, inadequacy or ineffectiveness of a remedy severely depreciates the 'cash value' of the right for that particular plaintiff, for whom the practical value of a right amounts to relief that has tangible effect.[195] A finding of unconstitutionality in the abstract, without the implementation of any remedial relief, does little to vindicate rights. Non-compliance therefore renders a remedial order impotent unless the court shows a tenacious commitment to holding the state accountable for its positive duties. In the longer run, a failure to fully comply with remedial orders can diminish the substantive content of the right being built bottom-up through the remedial process. As discussed in Section II, the contingency of the remedial process for enforcing positive duties makes full compliance harder to secure. Non-compliance can be a matter of degree in the context of positive duties, as systemic relief may be implemented but it nevertheless fails to meet the constitutional standard set by the court. The harm of partial compliance is often overlooked in this context, but by condoning inadequate systemic relief the court's exercise of discretionary remedial power undermines the value of the right at stake.

Conclusion

This chapter has laid the conceptual foundation for my thesis by clarifying the relationship between rights, remedies and positive duties. In doing so, it has underscored both the difficulty and the importance of remedying breaches of the state's positive duties. First, I diagnosed the *difficulty* of the court's remedial task by pointing to the range

[195] Levinson (n 14) 874.

and complexity of remedies for enforcing positive duties, which represents a remedial paradigm shift from the received remedial paradigm epitomised by private law. I characterised the distinctive remedial challenges associated with positive duties as 'family resemblances' which are epitomised by what I call the 'paradigm remedial puzzle' posed by positive duties. This paradigm remedial puzzle is the central problem that my thesis addresses. Second, the chapter drew attention to the *importance* of remedies for the full realisation of rights by drawing on the insights of remedial equilibration. My analysis emphasised the formative role of judicial discretion in mediating the 'permeable wall' or 'conceptual membrane' between rights and remedies, given the 'inevitab[ility] that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy'.[196] The formative role of remedies in constituting and concretising rights underscores the risk that rights may be under-realised when courts are confronted with the paradigm remedial puzzle posed by positive duties. The chapter therefore closed by bringing the insights of remedial equilibration to bear on the enforcement of the state's positive duties, identifying (1) the way that remedies for breaches of positive duties can either constrain or expand our understanding of the correlative right; (2) the artificiality of a strict separation between the tasks of adjudicating and enforcing rights; and (3) the harm to rights caused by non-compliance with remedial orders.

In providing this conceptual clarity, the chapter has uncovered the central role of discretionary remedial power in the enforcement of positive duties. The remedial paradigm of positive duties is characterised by a flexible right-remedy interlock in which systemic relief has to be ascertained rather than logically derived from the nature of the breach. Remedial choice for enforcing positive duties is therefore a strongly discretionary

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[196] Gerwitz (n 135) 679.

decision. Moreover, in exercising this discretion, courts should ensure the distinctive remedial challenges posed by positive duties do not constrain the full realisation of rights. Discretion is therefore not only an inevitable feature of the paradigm remedial puzzle posed by positive duties, but also the means for overcoming these remedial challenges to ensure the full realisation of rights. Recognising this central role of discretion, the next two chapters develop a focused account of discretionary remedial power in the context of positive duties. Chapter Three scopes out the *appropriate* exercise of discretionary remedial power and Chapter Four offers a normative framework for the *optimal* exercise of discretionary remedial power.

CHAPTER THREE

THE EXERCISE OF DISCRETIONARY REMEDIAL POWER

> The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that otherwise might be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges.[1]

Introduction

Chapter Two established both the difficulty and the importance of remedying breaches of the state's positive duties in human rights. There is no discrete, self-evident remedy that flows ineluctably from the breach of a positive duty, but rather a range of remedial possibilities for fulfilling rights. This flexibility in the right-remedy interlock presupposes the exercise of remedial discretion. Moreover, the distinctive remedial challenges posed by positive duties, which call for the court's sustained involvement in an extended remedial process, make it inevitable that 'judges' minds will shuttle back and forth between right and remedy' as remedial concerns influence the way that rights are conceived.[2] Bringing the insights of remedial equilibration to bear on positive duties, Chapter Two foregrounded the role of remedial discretion in controlling what passes through the permeable wall between rights and remedies, thus either expanding or constricting our understanding of rights.

With the benefit of this conceptual clarity on the reciprocal relationship between rights and remedies, Chapter Three turns to consider the risks and rewards of discretionary remedial power. It explores the central tension that characterises the

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[1] Benjamin N Cardozo, *The Nature of the Judicial Process* (YUP 1921) 94.

[2] Paul Gerwitz, 'Remedies and Resistance' (1983) 92 Yale Law Journal 585, 679.

exercise of discretionary remedial power: on the one hand, courts are constrained by the limits of their democratic legitimacy, institutional competence and judicial independence, but on the other hand, they are bound by their constitutional mandate to enforce the state's positive duties, providing just and equitable relief where the state has failed to fulfil rights. Much has been written about the implications of human rights review for the judicial role, as disagreement about the proper role for the court lies at the heart of the debate about the legitimacy and desirability of entrenched human rights. This chapter, however, limits its enquiry to the exercise of discretionary remedial power for enforcing the state's positive duties. By way of introduction, I would like to draw a few preliminary distinctions in order to situate my discussion about the court's remedial powers within the larger debate about the judicial role in human rights adjudication.

Firstly, my analysis of the judicial role relates to the exercise of remedial power in the context of *human rights review*, rather than the more traditional forms of *administrative review*. A key difference between these two modes of review lies in the object of review. In administrative review, courts exercise a supervisory jurisdiction over the actions or decisions of a public body exercising a public function. The primary focus is on the manner in which decisions or actions are taken, and the aim of review is to ensure fairness and sound reasoning in the exercise of administrative powers. Human rights review, by contrast, requires courts to scrutinise the substance of decision-making, evaluating both the content and effect of the government's actions and decisions for their consistency with human rights norms. While it would be an oversimplification to say that administrative review concerns the procedure of decision-making and human rights review the substance of decisions (not least because the distinction between process and substance is arguably one of degree rather than type),[3] the supervisory jurisdiction of administrative review is more process-oriented than the higher level, rights-oriented scrutiny exercised by courts in human rights review. A common objection to human rights review stems from a discomfort with the power it gives to courts in requiring them to scrutinise the substance and effect of government decisions and actions, rather than simply the fairness of the decision-making process. One such response to this has been a tendency to adopt deliberative remedial strategies, such as 'meaningful engagement',[4] that facilitate greater participation of the parties in the resolution of their own dispute, in the hope that this will deflect concerns about the anti-democratic nature of human rights adjudication. As will be explored in this chapter, these deliberative strategies have been criticised by some academics for 'proceduralising' human rights review into something that looks more like administrative review, while neglecting the court's responsibility to give meaning to the normative commitments embodied by rights.

This gestures towards the second distinction relevant to my enquiry, which is that my discussion concerns *remedial* power rather than the *adjudicative* power involved in establishing whether there has been a breach of a right. The different object of human rights review described above has meant that much of the debate about the judicial role has revolved around the suitability of the courts to determine the kinds of issues this rights-oriented mode of review raises. The predominant focus in discussions about human rights review has accordingly been on the competence and legitimacy of courts to determine whether governmental actions and decisions breach human rights norms, and

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[3] Trevor R. Allan, 'Fairness, Equality, Rationality: Constitutional Theory and Judicial Review' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord* (Clarendon 1998) 34.

[4] 'Meaningful engagement' is discussed as a kind of court-facilitated remedy in my typology of discretionary remedial power developed in Section V of this chapter.

whether such infringements are justified limitations on the right. Since the underlying concern about human rights review relates to the power it vests in courts, much has been written about the nature of adjudication and the ways in which courts are (or are not) constrained in their decision-making when reviewing the government's decisions and actions for compliance with human rights. Key points of dispute in these discussions include approaches to constitutional interpretation, standards of review, the doctrine of proportionality, and the methodology of the limitations analysis. Moving away from this preoccupation with the suitability of the courts to evaluate government compliance with human rights, this chapter is concerned with the court's exercise of remedial power *after* a breach has already been identified. Of course, as Chapter Two established, remedial concerns influence the court's interpretation of the normative content of rights, such that the determination of a breach and the exercise of remedial power are not totally separate tasks. There are, however, certain constraints and imperatives that are especially, even if not exclusively, pertinent to the court's exercise of remedial powers. By homing in on these specific influences, this chapter offers a focused discussion on the judicial role in the remedial context.

Thirdly, my account is concerned with the *exercise* of discretionary remedial power, not a justification of the constitutional foundation of the *granting* of such remedial power in judicial review. This chapter is applicable to constitutions that mandate the judicial enforcement of human rights and equip courts with broad and discretionary powers to remedy breaches of the state's correlative positive duties. It therefore does not enter into the background question of whether constitutional review is legitimate. The logically prior question of whether courts should be given such remedial powers in the first place falls outside the scope of my enquiry, as my thesis concerns jurisdictions in which human rights are in fact judicially enforced and courts are in fact equipped with discretionary remedial power. While this chapter aims to move beyond this foundational question, however, some of the objections frequently raised about the democratic legitimacy of human rights review are discussed insofar as they are relevant. Because these objections often extend into the debate about how courts should exercise their remedial powers, they can help us demarcate the limits of the proper remedial role of the courts. While courts are given a clear constitutional mandate to enforce the state's duty to fulfil human rights, they are also constrained by the basis and scope of that mandate. This chapter unpacks both the constraints and the imperatives that shape the exercise of discretionary remedial power.

Finally, it is worth emphasising that my normative account of the judicial role concerns the exercise of discretionary remedial power for enforcing the state's *positive duties* to fulfil rights, and therefore does not give equal attention to the exercise of remedial powers for enforcing *negative duties* of restraint. While much of the discussion is relevant to any general account of the judicial role in human rights review, the purpose is to offer particular insights into the constraints and imperatives that shape the remedial role of courts in respect of enforcing positive duties. It is necessary to add a caveat at this point, however, because positive duties often intersect with negative duties in cases where the state is required to protect competing rights. This happens frequently in eviction cases, for instance, where the state's negative duty to protect an owner's right to property coincides with the state's positive duty to fulfil other rights, such as the right to housing[5] or the right to education[6]. I will therefore deal with negative duties to the extent that they are relevant to the enforcement of positive duties, but my focus throughout remains on the court's exercise of remedial power to enforce the state's positive duties.

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[5] See, for example, *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

[6] See, for example, *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).

These four preliminary distinctions point towards the aim of this chapter. Moving beyond stalemated debates about the legitimacy of human rights review, my account seeks to reclaim a constructive role for the court in the state's collaborative enterprise of fulfilling human rights. The preoccupation with constraining and fixing the limits of discretionary remedial power has distracted from the strong constitutional mandate that courts have to ensure the state promotes positive freedom. A focus on positive duties enables this shift in perspective—instead of asking how *little* will suffice to protect rights, positive duties invite the more ambitious question of how *much* courts can achieve within the appropriate exercise of their discretionary remedial power. My account acknowledges the risks inherent in the discretionary nature of remedial power and the constraints on its exercise, but adds a more constructive dimension to re-balance the debate. This is achieved by strengthening our conceptualisation of the court's constitutional mandate to enforce positive duties, thus pointing to the rewards of discretionary remedial power when its exercise is shaped by this strong imperative.

My argument proceeds as follows. Section I characterises the broad and discretionary nature of constitutional remedial power that courts are given in the focus jurisdictions of my thesis. Section II then problematises this discretionary remedial power with reference to concerns about the court's democratic legitimacy, institutional competence and judicial independence that are aggravated by the distinctive remedial challenges posed by positive duties. Having acknowledged these constraints, Section III strengthens our conceptualisation of the court's constitutional mandate to enforce the state's positive duties. The entrenchment of positive duties implies a strong role for the court in ensuring state power is exercised to promote positive freedom. Section IV accordingly identifies the central tension that characterises the exercise of discretionary remedial power: on the one hand, there is a risk of judicial overreach where the court is insufficiently responsive to the constraints on its exercise of remedial power, while on the other hand, there is a risk of rights being under-realised where the court fails to satisfy the constitutional imperative to enforce the state's positive duties. In navigating this central tension, courts are not walking a judicial tightrope but are instead faced with a range of remedial possibilities within the appropriate scope of their discretionary remedial power. Section V further nuances my account of discretionary remedial power by identifying the diversity and fluidity of forms that its exercise can take. I develop a typology that captures the full spectrum of the court's engagement with remedies, ranging from court-approved remedies at one extreme to court-imposed remedies at the other extreme. This typology of discretionary remedial power and the range of appropriate remedial possibilities available to the court point to the need for principled remedial decision-making, thus laying the groundwork for Chapter Four.

I. The Broad and Discretionary Nature of Constitutional Remedial Power

This chapter develops a generalised account of constitutional remedial power that applies to particular kinds of courts and constitutional contexts. First and foremost, these are jurisdictions with written constitutions that grant courts a strong mandate to enforce human rights and their correlative positive duties. These courts are equipped with remedial powers that are broad and discretionary in nature to enable them to discharge this constitutional mandate. Broadly speaking, they operate within a common law adversarial model in which litigation is traditionally party-controlled while the judge plays a more passive, impartial role and is expected to give reasons for decisions. The courts that most closely fit with this model can be located in South Africa, Canada, India (subject to the deviations evident in public interest litigation) and the United States (particularly US state courts). There are, of course, significant differences between these jurisdictions and deviations from the generalised model are inevitable, but their resemblances are sufficient to speak coherently about them as particular permutations of the generalised model. The benefits of relying on such a generalised model necessarily come at the expense of detailed attention to specific courts or jurisdictions, for only in smoothing over some of these particularities is it possible to draw out the general features which resonate across a range of constitutional contexts.

The feature of this generalised model which is the focus of this chapter is the broad and discretionary nature of constitutional remedial power. A cursory glance at the constitutional remedial provisions of several focus jurisdictions demonstrates the flexibility and discretion accorded to courts to enforce human rights. The Canadian Charter approves any 'such remedy as the court considers appropriate and just in the circumstances'.[7] The discretionary nature of remedial power under Article 24 was affirmed by McIntyre J in *Mills v R* in strong terms:

> It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion...the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.[8]

Using a similar formulation, section 172(1)(b) of the South African Constitution empowers courts deciding constitutional matters to 'make any order that is just and equitable'.[9] The Court has often referred to its 'broad remedial discretion'[10] to provide just and equitable relief, but its early reluctance to issue supervisory orders unless there were strong reasons to suspect non-compliance meant the breadth of these powers

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[7] S 24(1) of the Charter of Rights and Freedoms, enacted in Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[8] *Mills v R* [1986] 1 SCR 863, 965–966.

[9] S 172(1)(b) of the Constitution of the Republic of South Africa, 1996.

[10] *Janse van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC) [28] (Goldstone J). See also *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

remained unexplored.[11] However, a spate of recent cases that have called for 'extraordinary' or 'exceptional' remedial interventions in response to government non-compliance signal a shift in gear.[12] In one such recent case, Mogoeng CJ elaborated on the nature of constitutional remedial power as follows:

> Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble situations...If justice and equity would best be served or advanced by [a particular] remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).[13]

Furthermore, given the Constitution's transformative vision, the Court has affirmed value of discretion for enabling greater responsiveness to the particular historical and socio-economic context of the case at hand. As Kriegler J put it bluntly in *Fose*, 'One cannot be more specific. The facts surrounding a violation of rights determine what form of relief is appropriate'.[14]

Article 32 of the Indian Constitution gives the Supreme Court 'power to issue directions or orders or writs...whichever may be appropriate, for the enforcement of any of the [fundamental] rights'.[15] In *MC Mehta v Union of India*, Bhagwati CJ clarified that the Supreme Court's remedial powers went hand-in-hand with its constitutional mandate to enforce human rights:

> Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and

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[11] See, for example, the Court's preference for a declaratory order over a supervisory order in *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC).

[12] The intervention in *Black Sash* was described as 'a remedy that must be used with caution and only in exceptional circumstances': *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) [51] (Froneman J). Similarly, *Mhlope* was characterised as 'an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis': *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) [137] (Mogoeng CJ). For an analysis of the Constitutional Court's recent use of structural interdicts, see Sue-Mari Viljoen and Saul Porsche Makama, 'Structural Relief - A Context-Sensitive Approach' (2018) 34 South African Journal on Human Rights 209.

[13] *Mhlope* (n 12) [132] (Mogoeng CJ).

[14] *Fose* (n 10) [97] (Kriegler J).

[15] Art 32(2) of the Constitution of India 1950.

> ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce fundamental rights.[16]

Article 142 further provides that a court 'may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it'.[17] The emphasis on 'doing complete justice' speaks to the significant breadth of remedial power conferred on Indian courts, and they have certainly embraced these expansive powers in discharging their constitutional mandate, most powerfully demonstrated by their public interest litigation process.[18]

The 'judicial power of the United States' conferred by article III of the US Constitution grants federal courts hearing cases 'in…Equity' the power to issue equitable remedies.[19] Federal trial courts also possess inherent equitable powers of discretion which grant them significant latitude in fashioning remedies for institutional reform.[20] The discretionary nature of the equitable powers enjoyed by federal courts in the US is well-established, authoritatively articulated by Burger CJ in *Swann*:

> The scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.[21]

The remedial powers of state courts is even broader, given that they are not subject to federal remedial doctrines of judicial restraint. While the Supreme Court's development of these doctrines has arguably constricted the equitable authority of federal courts to

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[16] *MC Mehta v Union of India* 1987 SCR (1) 819.

[17] Indian Constitution, art 142.

[18] See generally Shyam Divan, 'Public Interest Litigation' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

[19] Art III of the United States Constitution. Remedial power is also conferred on federal courts by statute. See, for example, 28 USC s 1343 (1976) for civil rights cases.

[20] Robert E Jr Buckholz and others, 'Special Project: The Remedial Process in Institutional Reform Litigation' (1978) 78 Columbia Law Review 784, 854.

[21] *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971) 15 (Burger CJ) (footnotes omitted).

craft remedies in public law litigation, state courts retain their 'equitable and inherent authority to create law, shape policy and devise remedies' in institutional reform litigation as much as in common law cases.[22]

While there are subtle textual differences to appreciate in the various remedial provisions surveyed above, the formulations can be generalised as variations on a theme of 'just and equitable' relief. Common to all provisions is the broad and discretionary nature of the constitutional remedial power conferred on these courts to enforce human rights. Section II problematises the discretionary nature of remedial power by identifying three constraints which a court should be responsive to when remedying a breach of the state's positive duties. They are the familiar concerns of democratic legitimacy, institutional competence and judicial independence. Without re-ploughing this well-worked terrain, I will briefly consider each constraint in turn to emphasise their special relevance to the enforcement of positive duties.

II. Problematising Discretionary Remedial Power

A. Democratic Legitimacy

In spite of its widespread practice and popularity, human rights review remains a highly contested aspect of the judicial role. Many of the concerns that continue to plague the practice of human rights review find their origin in the apparent tension between human rights and democracy, with the idea being that the entrenchment of human rights involves a transfer of power to an unelected and unaccountable judiciary. This results in

[22] Helen Hershkoff and Stephen Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' (2011) 115 Penn State Law Review 923, 978–979.

the so-called 'counter-majoritarian difficulty'[23] whereby courts have the power to overrule the decisions and actions of democratically elected representatives, which supposedly reflect the will of the majority. Objections to human rights review have largely drawn on process-related arguments,[24] the most well-known being Jeremy Waldron's articulation of 'The Core of the Case Against Judicial Review'.[25] Waldron argues that judicial review is politically illegitimate due to its supposed incompatibility with the right to participate, which he takes to be the authoritative basis for decision-making in any democracy.[26] His concern is that human rights review distorts the democratic values of representation and political equality by 'privileging majority voting among a small number of unelected and unaccountable judges'.[27]

The democratic objection is felt most acutely where courts are not only given power to invalidate government actions and decisions that are incompatible with human rights norms, but are also constitutionally mandated to remedy the breach. As Kate Hofmeyr observes, '[w]here the entrenchment of rights is combined with an obligation on the courts to ensure their enforcement by ordering remedies for their breach, a crucial aspect of the normative power of the courts vis-à-vis other branches of government is expressed through the courts' remedial function'.[28] As stipulated in the introduction, it falls outside the scope of this chapter to engage in a normative defence of human rights

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[23] This oft-cited formulation was coined in Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962).

[24] Process-based arguments can be contrasted with outcome-related arguments, which focus on the comparative success of the legislature and judiciary in reaching 'correct' decisions on human rights issues.

[25] Jeremy Waldron, 'The Core of the Case Against Judicial Review' [2006] Yale Law Journal 1346.

[26] See further his chapter on 'Participation: The Right of Rights' in Jeremy Waldron, *Law and Disagreement* (OUP 1999) ch 11, 232-254.

[27] Waldron (n 25) 1353.

[28] Kate Hofmeyr, 'A Central-Case Analysis of Constitutional Remedial Power' (2008) 125 South African Law Journal 521, 522.

review and so I make no attempt here to advance a justification of the (democratic) legitimacy of human rights review *per se*.[29] My enquiry instead proceeds on the basis that courts have in fact been granted such powers of review—the constitutional mandate has been given—such that the democratic objection (understood as a principled objection to the *granting* of such powers) is not of direct relevance. This is not to say, however, that concerns about the democratic legitimacy of how courts *exercise* their constitutionally granted powers of review are overlooked. Some of the concerns that inform the democratic objection extend into the exercise of constitutional remedial power and, to that extent, are relevant to the present discussion.[30]

Concerns about democratic legitimacy come to a head in the context of the broad and discretionary nature of remedial power. Those concerned by the power afforded to courts in human rights review are wary of remedial discretion as it risks indulging unconstrained decision-making in which courts encroach on the functions of the

[29] Waldron's core claim that judicial review is democratically illegitimate has been challenged from a number of angles. A particularly insightful response exposes the flaw in Waldron's assumption that the nature of representation in legislatures can be equated with democratic self-government: see, for example, Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 Oxford Journal of Legal Studies 733. More constructive responses have argued that human rights review in fact serves to enhance democracy: see, most famously, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP 1980); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (HUP 1999) especially 1-38. Some have drawn attention to the ways in which human rights review can enhance the deliberative dimension of democracy: see, for instance, Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013). In a similar vein, others have argued that human rights review can be a valuable channel for political participation, especially for those who might otherwise be marginalised or disempowered by the normal political process: see, for instance, Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451.

[30] In proceeding on the operating assumption that courts have in fact been given a constitutional mandate to enforce positive duties, my enquiry bypasses any head-on challenge posed by the counter-majoritarian difficulty. I recognise, however, that the source and extent of the constitutional remedial power granted to, or assumed by, a court will affect the scope of the appropriate exercise of that power. In jurisdictions like Canada, India and South Africa, the explicit conferral of extensive remedial powers in a written Constitution arguably takes much of the sting out of the counter-majoritarian difficulty. By contrast, in a jurisdiction like the United States where courts largely derive their remedial power as a necessary implication of their adjudicative role and develop those powers gradually in response to their changing constitutional role, the counter-majoritarian difficulty may resonate more strongly.

legislature and executive.[31] The concern is therefore not only that courts are granted extensive remedial powers, but that the *exercise* of those discretionary powers is insufficiently controlled or constrained. By its very definition, discretion implies a degree of freedom or latitude in discerning what course of action to follow. Discretion is, however, a matter of degree as its exercise can be more or less limited.[32] In the case of remedial discretion specifically, William Fletcher observes that its exercise can be limited in two ways: firstly, by internal controls in the form of clear legal norms that guide the discretionary formulation of a remedy; and secondly, by external controls such as the possibility of the decision being overturned on appeal.[33] The relevance of the democratic objection to the remedial context is therefore clear to see—if there are inadequate controls on the exercise of discretion in designing remedies, courts are unaccountable in their exercise of the power conferred on them through human rights review.

Concerns about democratic legitimacy are most pronounced in the exercise of remedial powers for enforcing the state's positive duties, particularly the paradigm remedial puzzle characterised in Chapter Two. A mandatory structural interdict directs the state to undertake positive steps to implement systemic relief. Due to the flexible right-remedy interlock, there are a number of possible forms of relief that could address the breach of a positive duty. Yet in issuing a structural interdict of this kind, the court is not simply overriding the decisions of other branches of government, but also mandating them to follow the particular course of action it has prescribed. Indeed, Fletcher describes the drafting of a structural interdict as 'the judicial analogue to administrative

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[31] Hofmeyr (n 28) 523.

[32] This is dealt with comprehensively in Chapter Four, Section I.

[33] William A Fletcher, 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1981) 91 Yale Law Journal 635, 644.

or executive action—the implementation of a general command in a particular setting'.[34] In contrast to the discretion courts frequently exercise when developing legal rules in a casuistic fashion, he argues that 'the specificity of the [structural interdict] and the indeterminacy of the norms that guide its drafting make the trial court's remedial discretion more difficult to control, and hence more threatening'.[35] For this reason, sceptics who are wary of the court's discretionary remedial power criticise mandatory structural interdicts as invasive remedies that undermine the separation of powers by allowing the courts to perform functions that they regard as the constitutional preserve of the executive and legislature.

B. Institutional Competence

The second concern about the discretionary nature of remedial power focuses on the limits of the court's institutional competence. The paradigm remedial puzzle set out in Chapter Two gestured towards this constraint by emphasising the polycentric nature of ascertaining systemic relief. Structural interdicts are often chosen to remedy systemic violations, where the failure to fulfil rights is not the result of a discrete oversight or instance of negligence, but rather the result of institution-wide failings. In these contexts, the enforcement of the state's positive duties usually requires complex structural changes that tackle systemic violations at their root. This involves consideration of a great number of diverse interests to effect reform that by its very nature is designed to have far-reaching impact. In crafting mandatory structural interdicts for effecting systemic improvements, however, the court may lack the competence and knowledge needed to

[34] ibid.

[35] ibid.

direct the implementation of such reforms. This information deficit is compounded by the forward-looking nature of positive duties and the myriad of possible ways to remedy a particular systemic violation, as the court may be ill-equipped to make the various assessments and trade-offs needed to discern the best course of action. For this reason, the concern is not only that courts are badly placed, democratically speaking, to direct the government in its performance of positive duties, but that they also lack the technical expertise required to implement the complex polycentric reforms that this entails. Discretion may therefore facilitate poor decision-making where courts lack the institutional competence required to ascertain systemic relief.

C. Judicial Independence

The third constraint on discretionary remedial power concerns the importance of maintaining judicial independence. Judicial independence can be strained both when ascertaining systemic relief and supervising its implementation. Firstly, the strategic nature of litigation and its procedural parameters mean that the judicial task of ascertaining systemic relief is a responsive exercise—the court responds to the particular case before it. Indeed, the exercise of discretionary remedial power is 'doubly responsive', to borrow Kate Hofmeyr's phrase, as the court must both wait for a case to be brought before it and establish a breach before it can engage its remedial powers.[36] Litigators make several key decisions that limit, from the outset, the remedial reach of the court. Most obviously, the litigator makes a calculated choice about the particular issue to challenge in court, picking a claim that is tactically strong in light of the court's existing

[36] Hofmeyr (n 28) 529. It must be noted that the unique model of public interest litigation in India presents an exception to the generalised constraint of judicial independence as described in this section. In public interest litigation, judges in India enjoy considerable powers to raise new issues – and even cases – in a proactive rather than responsive manner.

body of jurisprudence. The timing for instituting the claim might also be strategic, particularly in structural reform cases, where litigators hope to benefit from the momentum of public support built up through complementary forms of social advocacy. The choice of claimant holds important implications for the court's exercise of remedial powers, as the relief granted would differ depending on whether a class action was instituted or whether individual claimants were relied on to establish the state's breach of its positive duties. Most important, however, is the formulation of the claim, as the importance of maintaining independence may prevent a court from addressing governmental failures *suo motu* that do not relate to the breach established in a particular case.[37]

Judicial independence may be strained in responding to these particularities of a case. First, there may be a representation deficit in formulating systemic relief as the parties before the court do not adequately give voice to stakeholders who are absent in proceedings. The number and diversity of interests implicated by the breach of the state's positive duties may therefore lead to court to draw on a wider set of actors to assist in the collaborative task of formulating systemic relief. Secondly, the state's breach of its positive duties may establish the need for systemic relief that extends well beyond the claim as framed by the parties. While the constraint of judicial independence should make a court wary of extending remedial relief beyond what is consistent with the claim

[37] This generalised claim serves to underscore the link between judicial independence and the responsiveness of a court in adjudicating and remedying the particular claim brought before it by a claimant. In several of my focus jurisdictions, some deviation from this general approach is not unusual. Unsurprisingly, India offers the clearest example of such a deviation, given the relative freedom enjoyed by judges in public interest litigation to raise and enquire into breaches of the state's positive duties. See in this regard, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) ch 5. In South Africa, by contrast, judges do not have such powers to pursue possible breaches unrelated to the litigation before it, but in certain circumstances a court may raise a possible constitutional breach where it is relevant to the issue in dispute but the parties may not have addressed it. See in this regard the approach as summarised by the South African Constitutional Court in *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC) at para 37. Nevertheless, such deviations do not detract from the default approach being that courts, on account of judicial independence, confine themselves to the breaches as alleged by the claimants.

as formulated,[38] there may be instances where the interests of similarly situated rights-holders calls for the court to look beyond the confines of the dispute when ascertaining systemic relief. As discussed in Section III, the court's constitutional mandate to enforce the state's positive duties extends beyond resolving the narrow dispute between the parties to ensure systemic improvement that gives expression to constitutional values. To achieve this, the court might seek innovative ways to broaden the base of stakeholders included in the remedial process, so as to mitigate any representative deficit.

Secondly, judicial independence may be strained by the lengthening and diversification of court involvement in the implementation of systemic relief. Because the paradigm remedial puzzle characterised in Chapter Two concerns systemic violations in institutional settings, the court generally retains supervisory jurisdiction to ensure the implementation of its positive directives. This allows for gradual and flexible implementation of the remedial order, which may be recalibrated or revised as new facts or remedial challenges arise during the process of systemic reform. This continued involvement of the court stands in stark contrast to one-shot remedies, like declaratory orders, which leave the manner and details of remedying a breach up to the legislature or executive, such that the court's role ends with the handing down of its order. In stark contrast, the court may be heavily involved in the administration of systemic relief as well as monitoring and reporting efforts. The success of implementation efforts depends on the careful co-ordination of multiple actors, making the court reliant on a range of stakeholders beyond the parties, often even civil society, which blurs a strict conception of judicial independence.

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[38] India is a clear exception to this general approach. Firstly, art 142(1) of the Constitution gives the Supreme Court broad powers to 'pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it'. Secondly, the range of procedural innovations in public interest litigation, such as the relaxation of standing rules and the wide-ranging powers of fact-finding enjoyed by the Supreme Court, represent a fundamental change to the responsive nature of the judicial role in the traditional adversarial system.

However, while the constraint of judicial independence may limit the remedial reach of the court, it should also inform the court's own strategic choices when exercising discretionary remedial power. Although courts are independent, their remedies are not immune from the strategic dynamic of litigation. Indeed, Gauri and Brinks observe that 'courts themselves are deeply implicated in this set of strategic interactions' and therefore 'craft their opinions with an eye to the likelihood of compliance, the political reaction and its effects on the standing of the judiciary, and the existence of a strong litigant who can engage in follow up or bring new cases.'[39] A court should exercise its remedial powers mindful of its own limits and attentive to the complexity of strategic factors that will determine the effectiveness of its remedial order. Far from rendering courts impotent to contribute to social change, their potential to promote rights lies in precisely the fact that 'they are never fully independent of political pressures', enabling them to 'help overcome political blockages, channel important information to political and bureaucratic actors, create spaces of deliberation and compromise between competing interests, and hold states accountable to incomplete commitments.'[40]

III. Conceptualising the Constitutional Mandate to Enforce Positive Duties

Having explored the constraints on the exercise of discretionary remedial power, this section takes a closer look at the constitutional imperative on courts to provide just and equitable relief for the state's failure to fulfil rights. It strengthens our conceptualisation of this constitutional mandate by underscoring the fact that positive duties rest on a

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[39] Varun Gauri and Daniel M Brinks, 'Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 4.

[40] ibid 6.

positive vision of freedom which requires the state to create the conditions for agency and choice. The entrenchment of positive duties gives courts an important role to play in promoting positive freedom, not least because courts 'speak' through their remedies to express and give tangible meaning to constitutional values.

A. Promoting Positive Freedom

Given that a constitution is the structural framework through which state power is exercised, it is unsurprising that conflicting views on the court's role in human rights review can often be traced back to more fundamental disagreement about the role of the state.[41] The relationship between individuals and the state has generated many centuries of rich debate in political philosophy and it remains as much a live issue as ever given the changing nature of the state in a globalised world.[42] It is not necessary to wade into these contested waters here, except to point out how our understanding of the role of the state sets the terms of debate about human rights review. This section flushes out these background assumptions by contrasting the implications of negative and positive conceptions of freedom for our understanding of the state's duties in human rights. I offer a strengthened conceptualisation of the court's constitutional mandate by underscoring the connection between the state's positive duties and its duty to promote positive freedom.

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[41] I use 'constitution' with a small 'c' here to denote the law and conventions that comprise a state, to distinguish it from 'Constitution' with a capital 'C', which I take to refer to the canonical text of a written Constitution. In some states, like South Africa and Germany, the constitution is so closely aligned with Constitution that the distinction makes little difference. Even though my generalised model concerns courts in jurisdictions with a written Constitution, the distinction is still relevant here as constitutionalism can embrace more than the four corners of the Constitutional text.

[42] For an overview of some of this literature for its relevance to the state's positive duties, see Fredman (n 37) ch 1.

An enduring theme in human rights discourse has been the need to protect the liberty of individuals from state interference. Where the state is perceived as a threat to individual freedom, human rights have traditionally served to constrain and limit the exercise of state power.[43] The function of human rights in protecting negative freedom—that is, freedom from state interference—has led to an alignment of human rights with the state's negative duties, which in turn gives rise to a misguided view of the judicial role. Human rights review is conceived of as 'a form of power-blocking mechanism' in which the court's role is to interpose rights as a 'protective shield' or 'form of immunity' against coercive state power.[44] It therefore pits individualised human rights and the state's interests against one another, rather than seeing human rights as constitutive of the common good.[45]

This preoccupation with limiting state power through the enforcement of negative duties misses the vital function of human rights in protecting and promoting *positive* freedom, which seeks to ensure that individuals have the agency to actually exercise their rights.[46] Positive freedom envisages a constructive role for the state in creating the conditions for autonomy that enable individuals to exercise agency and choice. Fredman has fleshed out the implications of this richer view of freedom for the state's positive duties in human rights, drawing on Sen's theory of capabilities and Raz's autonomy-

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[43] ibid 9.

[44] Colm O'Cinneide, 'Steering the Ship of State: Fundamental Rights, State Power and Janus-Faced Constitutionalism' (WG Hart Legal Workshop, London, 29 June - 1 July 2010) 10 <https://sas-space.sas.ac.uk/3433/> accessed 24 November 2018.

[45] For a critique of this conception of human rights review as pitting human rights and the common good against each other, see Paul Yowell, 'From Universal Rights to Legislated Rights' in Grégoire Webber and others, *Legislated Rights: Securing Human Rights through Legislation* (CUP 2018). Note, however, that Yowell's critique is used in support of an argument that legislatures, rather than courts, should be responsible for specifying the content of human rights.

[46] Fredman (n 37) 9.

based doctrine of freedom among other sources.[47] Both Sen and Raz underscore the positive dimensions of freedom in grounding a duty on the state to create the conditions for individuals to exercise agency and choice.[48] Indeed, Raz argues that positive freedom is intrinsically valuable as 'an essential ingredient and a necessary condition of the autonomous life'[49] while negative freedom is only 'valuable inasmuch as it serves positive freedom and autonomy'.[50] His reminder that negative freedom derives its value from its contribution to autonomy speaks to the interdependence of negative and positive duties in protecting and fulfilling human rights.[51]

The entrenchment of the state's positive duties in human rights represents a strong recognition of the state's duty to promote positive freedom. The court's mandate is not only to limit state interference with individual freedom, but also to ensure the state creates the conditions for individuals to exercise their human rights. Recognising the constructive role of the state in promoting positive freedom therefore strengthens the normative imperative of the constitutional mandate to enforce positive duties. It also offers a powerful counterbalance to the democratic critique discussed in Section II above, which belies a bias towards establishing the limits of state power. Human rights are no longer serving merely as shields or immunities that protect individual liberties but

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47 ibid ch 1. See further Amartya Sen, 'Human Rights and Capabilities' (2005) 6 Journal of Human Development 151; Joseph Raz, *The Morality of Freedom* (Clarendon 1986) especially ch 15.

48 Sen notes that '[t]he idea of capability (i.e. the opportunity to achieve valuable combinations of human functionings—what a person is able to do or be) can be very helpful in understanding the opportunity aspect of human rights'. Sen (n 47) 153. The first two features of Raz's autonomy-based doctrine of freedom are most relevant for our purposes: 'First, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy.' Raz (n 47) 425.

49 Raz (n 47) 409.

50 ibid 410.

51 ibid.

rather as claims to state action that promotes positive freedom. The court is not merely checking or constraining the exercise of state power, but actively steering the exercise of state power towards the fulfillment of human rights. A negative conception of freedom, with its neglect of imperatives on the state to promote positive freedom, sits uneasily with this envisaged role for the courts.

B. 'Speaking' Through Remedies

A stronger conceptualisation of the court's constitutional mandate is also gained by appreciating the constructive role of remedies in expressing constitutional values. Human rights are constitutive of the common good, and positive duties realise the fullness of this constitutional vision. When the state fails to fulfil rights, this constitutional vision of the common good is undermined. In his seminal essay 'Two Models of Adjudication', Owen Fiss recognised that constitutional values are often threatened 'not by individuals but by the operations of large-scale organisations, the bureaucracies of the modern state'.[52] In directing the structural reform necessary to address these systemic threats, Fiss argues that the court is discharging its mandate to give meaning to the set of constitutional values that 'inform and limit the function of government and constitute the principal source of our public morality'.[53] By grounding the need for structural reform in constitutional values, Fiss conceptualises the court's mandate as 'bring[ing] the state and its bureaucratic apparatus into conformity with our public morality [as embodied in the Constitution]'.[54]

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[52] Owen Fiss, 'Two Models of Adjudication' in Robert Goldwin and William Schambra (eds), *How Does the Constitution Secure Rights?* (American Enterprise Institute Constitutional Studies 1985) 36.

[53] ibid 40.

[54] ibid.

This insight resonates with expressive theories of constitutional law that emphasise how rights are 'tools courts use to evaluate the social meanings and expressive dimensions of governmental action'.[55] The state's failure to fulfil rights is an expressive harm to constitutional values, recognised as such by the court when it provides relief for the state's breach of its positive duties. In charting the expansive contours of these constitutional values through the exercise of discretionary remedial power, the enforcement of positive duties fulfils an important expressive function 'in making vocal and audible the ideals that otherwise might be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges'.[56] Courts 'speak' through their remedies, giving tangible meaning and concrete form to constitutional values. The court's constitutional mandate to enforce the state's positive duties therefore enables a rights-oriented vision of the common good to be expressed in all its fullness. This strengthened conceptualisation of the court's mandate represents an imperative that discretionary remedial power be exercised to give full expression to constitutional values.

IV. Scoping the Exercise of Discretionary Remedial Power

A. The Central Tension

Having set out the constraints on discretionary remedial power and affirmed the strong imperative of the court's constitutional mandate to enforce the state's positive duties, we can now articulate the central challenge that characterises the exercise of discretionary

[55] Richard H Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 The Journal of Legal Studies 725, 725.

[56] Cardozo (n 1) 94.

remedial power. On the one hand, courts are mandated to provide just and equitable relief for breaches of the state's positive duties. Courts therefore have a constitutional responsibility to ensure that the state's positive duties are enforced through remedies that give full expression to rights. The broad and discretionary nature of constitutional remedial power equips courts to discharge this constitutional mandate effectively. On the other hand, concerns about the limits of the court's democratic legitimacy, institutional competence and judicial independence are accentuated in the paradigm remedial puzzle posed by positive duties. Courts need to be responsive to this triad of constraints when exercising their discretionary remedial power. This, then, is the central tension that animates the judicial role in the remedial context: the constitutional mandate represents an imperative on courts to provide just and equitable relief for breaches of the state's positive duties, but in doing so they are constrained by the limits of their democratic legitimacy, institutional competence and judicial independence.

Navigating this tension is essentially an interpretive challenge for courts, as the consequences of enforcing the state's positive duties are contingent on the choices courts make when exercising their discretionary remedial power. As established in Chapter Two, the breach of a positive duty does not dictate what specific remedy ought to be granted. There is seldom, if ever, only one remedial response that could vindicate a right at stake, not least because a remedy is always a contextualised response to a breach in the sense that it grows out of a particular case that is brought before the court. As Kate Hofmeyr observes, '[t]o the extent that constitutional remedial power is discretionary, there is no necessary relationship between the violation of a positive right and any particular order that the court will grant'.[57] It is discretion which enables courts to be flexible in their exercise of constitutional remedial power so as to be responsive to *both* the constitutional

[57] Hofmeyr (n 28) 523.

imperative to provide just and equitable relief and the constraints imposed by the limits of their democratic legitimacy, institutional competence and judicial independence.

B. The Outer Limit of Constitutional Remedial Power

The point of departure for determining the scope of the *appropriate* exercise of the court's remedial powers is to demarcate the outer bounds of the court's *legal* (in the sense of constitutionally justified) remedial powers. The relevant constitutional remedial provision determines the fullest extent of the court's legal remedial powers, since the court's remedial jurisdiction flows from the provision itself. Put differently, the grant of remedial powers constitutes the limits of the court's legal exercise of those powers. If a court, when exercising remedial discretion, goes beyond what the constitutional remedial provision empowers it to do, it is clearly overreaching by exceeding its *legal* remedial powers. The textual framing of the relevant constitutional remedial provision therefore sets the outer limit of the court's exercise of discretionary remedial power. Somewhat ironically, however, the language typically used in these provisions is so broad as to resist clear limits. As John Sopinka observes in the Canadian context, the textual formulation 'can be characterized as a *non-limit* to the availability of constitutional remedies. The wording of the remedy sections of the *Charter* is very wide, giving the courts a seemingly endless variety of remedial options'.[58] In this sense, we can say that courts are limited only by their own imagination in exercising discretionary remedial power to provide just and equitable relief.

While the textual framing of remedial provisions is the starting point for determining the outer limits of legal remedial powers, the process of establishing and

[58] John Sopinka, 'Constitutional Remedies and Their Limitations' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (Carswell 1991) 358.

articulating these limits is an interpretive exercise undertaken by courts themselves. The abstract, normative nature of remedial provisions leaves them open to interpretation, with the result that courts necessarily self-impose the limits of their own remedial powers through their interpretation of the text and the body of jurisprudence that has already developed. This interpretive exercise will be influenced by the constitutional culture and political context in which the court operates, which may also change over time. For example, the South African Constitutional Court expressed reluctance in its early judgments to grant supervisory orders but recent decisions demonstrate a readiness to grant more intrusive remedies, especially in response to persistent non-compliance and a lack of accountability in government institutions. Madlanga J's judgment in *Mhlope* registers this recent emphasis on the expansiveness of the court's remedial powers, warning that courts should not self-censor their exercise of these powers:

> The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to do.[59]

Moreover, courts may rhetorically acknowledge that their remedial powers are 'extensive' but not 'limitless',[60] but they seldom provide a precise account of where these limits lie. The difficulty of articulating these limits is captured by Burger CJ's observation in *Swann* that, 'in seeking to define the scope of remedial power or limits on remedial power of courts in an area as sensitive as we deal with here [namely school desegregation], words are poor instruments to convey the sense of basic fairness inherent in equity'.[61] Furthermore, even where courts do articulate their interpretation of the full scope of their remedial powers, they seldom test this outer limit in practice, as the

[59] *Mhlope* (n 12) [83] (Madlanga J).

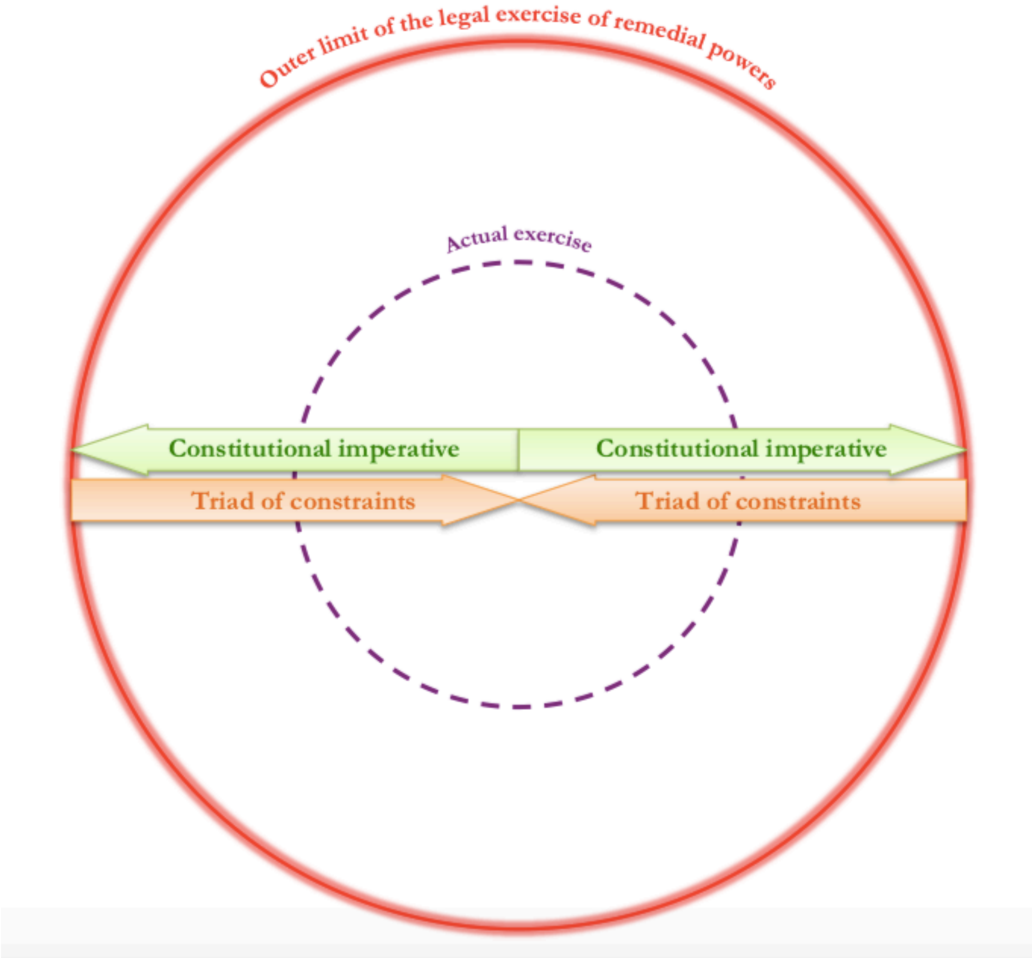
[60] *Black Sash* (n 12) [44], [51] (Froneman J).

[61] *Swann* (n 21) 31 (Burger CJ).

appropriate exercise of remedial power in any particular case is generally more tightly drawn owing to the constraints of democratic legitimacy, institutional competence and judicial independence.

Figure 1 below depicts the interaction between the imperative of the constitutional mandate and the triad of constraints as they bear on the exercise of constitutional remedial power. The red circle depicts the outer limit of the court's legal exercise of constitutional remedial power. As discussed above, the court establishes where this outer limit lies through its interpretation of the textual provisions and jurisprudential sources from which it derives its remedial powers. This means that although such an outer limit would appear to be fixed and clearly discernible, it is in fact open to contestation and therefore could shift over time in a particular jurisdiction. For this reason, the outer limit is represented as being a circle with an indistinct or fuzzy perimeter. The constitutional mandate and the triad of constraints are depicted in Figure 1 as arrows. The constitutional mandate is an imperative encouraging a fuller exercise of remedial power, such that its arrowheads extend outwards. The limits of the court's democratic legitimacy, institutional competence and judicial independence are constraints that constrict what is an appropriate exercise of remedial power, such that its arrowheads are directed inwards towards the centre of the circle.

Figure 1: Scoping the exercise of discretionary remedial power



C. The Appropriate Exercise of Discretionary Remedial Power

While the outer limits of the *legal* exercise of constitutional remedial power are very wide indeed, the *appropriate* exercise of such powers will depend on the unique interaction of the constitutional imperative and the triad of constraints as they apply to any particular case. By definition, an appropriate exercise of remedial power will also be a legal exercise of remedial power—it is necessarily inappropriate for courts to exercise powers not constitutionally granted to them. In scoping out their appropriate remedial jurisdiction, courts should bring relevant case-specific factors to bear on how best the constitutional imperative of just and equitable relief would be satisfied in the circumstances as well as how the limits of their democratic legitimacy, institutional competence and judicial independence might pull in the opposite direction. The triad of constraints will tend to constrict the scope of what is an appropriate exercise of remedial power, while the constitutional mandate to enforce the state's positive duties will tend towards a more expansive exercise of remedial powers. Importantly, courts are not walking a judicial tightrope when navigating this tension, but rather scoping out the extent of their appropriate remedial jurisdiction on the basis of their constitutional mandate and the triad of constraints as they pertain to the particular case at hand. The appropriate exercise of discretionary remedial power in any particular case is unlikely to yield only one or two remedial options, but rather a range of appropriate remedial possibilities from which the court can discern what it considers to be the best option.

Figure 2: The appropriate exercise of discretionary remedial power

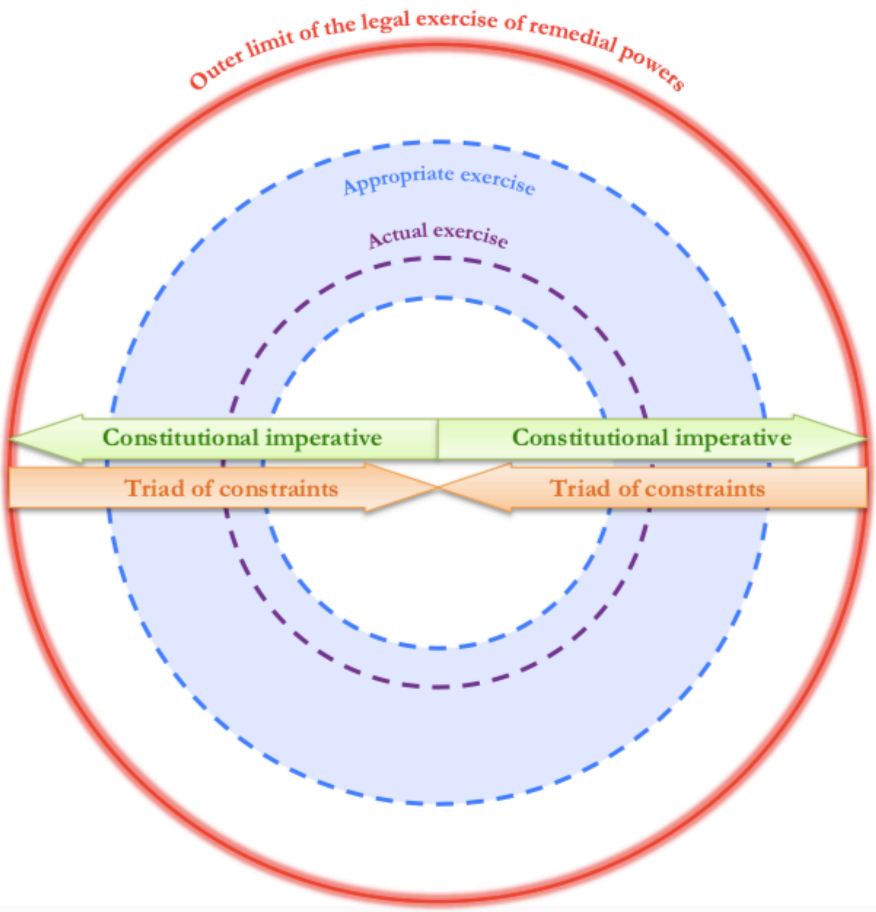


Figure 2 above depicts the appropriate scope of discretionary remedial power in any particular case, with an example of where an actual exercise of power might lie within that range of appropriate remedial possibilities. The appropriate scope is depicted by an annulus shaded blue to suggest that the entire area between the concentric circles falls within an appropriate exercise of remedial power. Yet the concentric circles are drawn using a dotted line to indicate that the scope of the appropriate exercise of remedial powers is contested. Firstly, judges may disagree with one another in discerning how the imperative and triad of constraints shape what is an appropriate remedy in any particular case. Secondly, there may be external criticism of the court's determination of the scope of the appropriate exercise of remedial powers. The parties to the litigation, similarly situated groups to the claimants, the government, academics, and general members of the public may hold different views to the court and, indeed, amongst themselves.

D. The Risk of Judicial Overreach

There are two risks that flow from the tension between the constitutional imperative to enforce the state's positive duties and the triad of constraints which pull in the other direction. First, there is a risk that the court may be insufficiently responsive to the limits of its democratic legitimacy, institutional competence and judicial independence with the result that it overreaches the scope of its appropriate exercise of remedial power. While the broad and discretionary nature of remedial power equips the court to ensure rights are fulfilled, it also creates the risk that the court might overstep the proper limits of its constitutional role as determined by the triad of constraints. This may involve encroaching on the functions of the other branches of government, exceeding the bounds of institutional competence or failing to maintain judicial independence. Judicial overreach is a matter of degree and is subject to disagreement in the same way that the scope of the appropriate exercise of remedial powers is open to contestation. Furthermore, it is difficult to identify conditions in the abstract that would constitute overreaching, because the determination of the appropriate scope of remedial power is a contextual exercise.

Figure 3: Judicial overreach

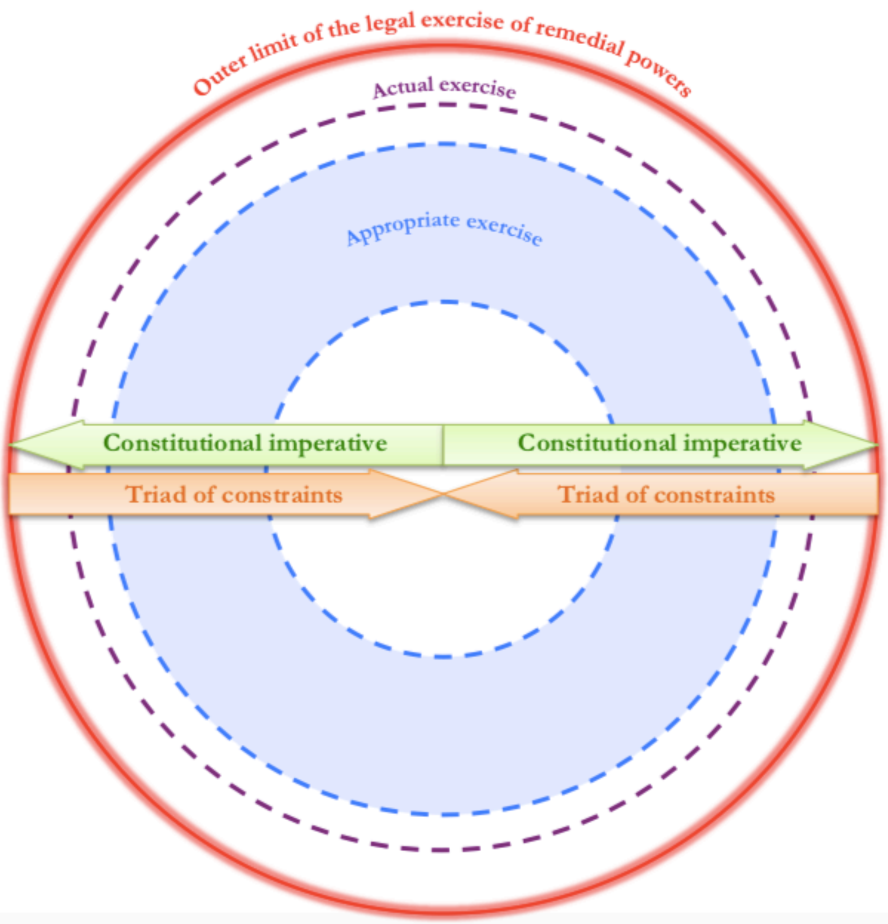


Figure 3 above depicts an instance of judicial overreach. Importantly, the concept of overreaching is intended to describe the *inappropriate* exercise of remedial power, not an exercise of remedial power that exceeds the outer limit of the legal exercise of remedial power as granted by the relevant remedial provision. For this reason, the illustration of judicial overreach shows the actual exercise of remedial power as lying between the appropriate exercise and outer legal limit of remedial power.

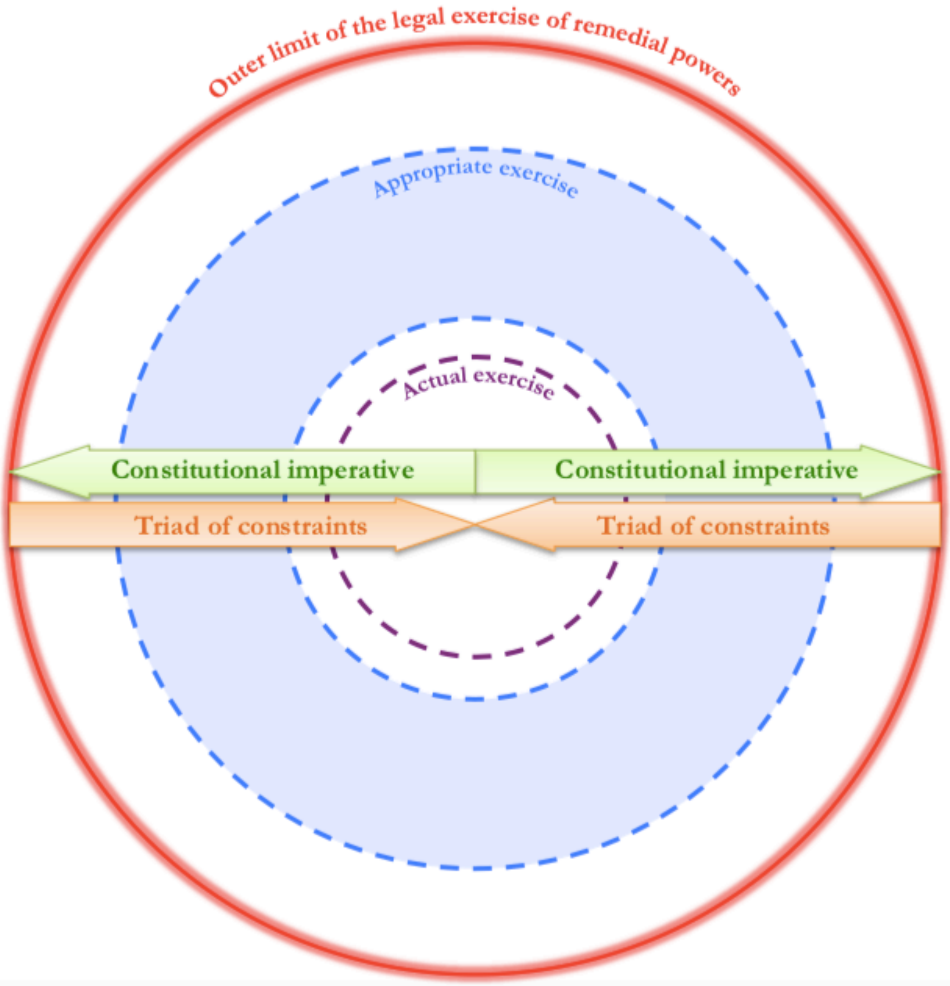
E. The Risk of Under-Realising Rights

The other risk inherent in the exercise of discretionary remedial power is that the court may be insufficiently responsive to the imperative of its constitutional mandate, with the result that rights are under-realised. The risk of judicial overreach is frequently cited as a concern about discretionary remedial power, but there is just as much risk that the court will be overly deferent and constrained in its exercise of discretionary remedial power. This may entail a complete failure to provide just and equitable relief, or providing relief that only gives effect to a very 'thin' conception of the right breached. As discussed in Chapter Two, remedial equilibration illuminates one important way in which this risk can materialise. Where the court anticipates the undesirable remedial consequences of enforcing the state's positive duties, the flexibility afforded by discretion creates the risk of a more constrained interpretation of the right to avoid these remedial implications. The triad of constraints is often relied on to justify this restrictive approach, particularly through a negative conceptualisation of the separation of powers doctrine which is 'ritually invoked by courts as a way of avoiding their constitutional mandate to interpret and enforce constitutionally guaranteed rights'.[62] This form of 'remedial deterrence' fails to recognise the formative role of positive duties in constituting the common good by promoting positive freedom, and so diminishes the expressive harm of the state's breach. The discretionary nature of remedial power therefore runs the risk that the court might 'under-realise' rights. Figure 4 below depicts this scenario, with the actual exercise of

[62] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010) 67.

discretionary remedial power represented as a tightly constricted circle that falls inside the annulus of the appropriate scope of remedial power.

Figure 4: Under-realising rights



V. A Typology of Discretionary Remedial Power

This chapter has so far explored the central tension that characterises the exercise of discretionary remedial power and identified its associated risks of judicial overreach and under-realising rights. The interaction between the constitutional imperative and the triad of constraints takes on a unique dynamic in every case because the court's exercise of discretionary remedial power is responsive to the facts surrounding the particular breach established. This makes it difficult to characterise a specific remedy as appropriate or inappropriate in the abstract. However, we can further nuance and particularise the central tension explored in this chapter by considering the concrete forms that the exercise of discretionary remedial power can take. This final section of the chapter therefore develops a typology of discretionary remedial power that sets out the diversity and fluidity of forms that its exercise can take. I identify six types of remedial formulation which entail the exercise of discretionary remedial power: (1) court-*approved* remedies; (2) court-*facilitated* remedies; (3) court-*prompted* remedies; (4) court-*selected* remedies; (5) court-*introduced* remedies; and (7) court-*imposed* remedies. In an extended remedial process, there will often be some fluidity in the form that the exercise of discretionary remedial power takes, such that these six types are not mutually exclusive within a single case.

There is a descriptive claim as well as a normative claim underlying this typology. The descriptive claim is that the exercise of discretionary remedial power takes on a greater diversity of forms than is frequently portrayed in the literature. Sabel and Simon have observed in this regard that:

> Much criticism [of public law litigation] has been directed at a model of judge-centered, hierarchical and rule-bound intervention that has ceased to correspond to trial court practice. In fact, trial judges and litigants have crafted more decentralized and indirect forms of intervention that rely on stakeholder negotiation, rolling-rule regimes, and transparency.[63]

Those concerned about the broad and discretionary nature of remedial power tend to characterise remedies as court-imposed solutions, with little attention to the ways in which the exercise of discretion is responsive to, and constrained by, the particularities of the case at hand. Discretion is portrayed as unconstrained, and remedial decision-making is abstracted from the context in which it is embedded. At the same time, there is a

[63] Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015, 1100.

tendency to overlook the discretionary nature of approving a settlement or consent decree. The court's role is portrayed as simply rubber-stamping the remedial plan that has culminated from party-controlled negotiation, thus minimising the strategic and legal significance of their agreement being made an order of the court. The detailed, contextualised analysis undertaken in my case studies reveals a more complex and nuanced reality, which is reflected in the typology developed here. The typology seeks to capture the full spectrum of the court's involvement in remedial formulation, ranging from court-approved remedies at one extreme to court-imposed remedies at the other extreme. While the former features minimal judicial involvement in remedial formulation, the latter type entails more intensive judicial control over the determination of a remedial plan for enforcing the state's positive duties.

My normative claim flows from this descriptive reality. These diverse types of remedial formulation *all* involve the exercise of discretionary remedial power. This means that in all the scenarios identified below, the court retains a responsibility to ensure the remedy—however formulated—provides just and equitable relief. For example, court-approved remedies draw attention to the way that remedial formulation can be strongly strategic or party-controlled, constraining discretion as a strongly responsive exercise of remedial power. However, this dynamic does not negate the court's responsibility to ensure the settlement provides just and equitable relief, and the court therefore retains discretion to refuse its approval on the basis that the negotiated remedial plan under-realises rights or would constitute judicial overreach. The triad of constraints and the constitutional imperative set out in Sections II and III apply in all these scenarios and, accordingly, the risks of judicial overreach and under-realising rights can materialise in any of them.

A. The Diversity of the Forms of Discretionary Remedial Power

1. Court-*Approved* Remedies

The first form that the exercise of discretionary remedial power can take is the approval of a remedial plan arising from an out-of-court settlement negotiated between the parties, with the result that it becomes an order of the court. The court does not play any active role in remedial formulation, having neither prompted, facilitated or supervised the settlement negotiations. Instead, the court is presented with a remedial plan to which all the parties consent and that they wish to have made an order of court. Court-approved remedies can be distinguished from court-facilitated remedies, discussed below, by the fact that they are not preceded by litigation which has culminated in a decision on the merits of the case. The consent between the parties is not grounded in the court's determination of a breach of the state's positive duties. Instead, the obligations of the parties are established through negotiation of an agreement as to what systemic relief is to be implemented. Such an agreement may explicitly or implicitly recognise a breach of the state's positive duties.

The judicial approval of settlement agreements is a well-established practice in common-law jurisdictions such that its availability is generally assumed without much reflection on its theoretical basis. However, the legal status and legitimacy of court-approved remedies have increasingly become the subject of disagreement in the US, particularly in the context of structural reform litigation where consent decrees are common.[64] Proponents of the practice point to two chief advantages that settlement is

[64] In general discussion, I use the term 'court-approved remedy' to emphasise the court's role in approving settlements and to avoid privileging any particular jurisdiction-specific terminology such as 'consent decrees' (US) or 'settlement agreements' (South Africa). However, I use the jurisdiction-specific term where referencing a particular jurisdiction.

thought to secure: first, its efficiency in conserving the scarce resources of the civil justice system and, second, the increased likelihood of compliance due to its basis in consent rather than a coercive court order.[65] Rather than draining valuable judicial resources in ascertaining how to bring complex institutional arrangements into compliance with abstract constitutional norms, the parties present the court with their ready-made remedial plan.[66] The parties' agreement over the details of this plan presumes their willingness to comply with it.

These two alleged advantages have been called into question by alternative accounts of the dynamic of settlement. The first rebuttal is that any efficiency gained through settlement is compromised by its expediency in prioritising the interests of the parties rather than ensuring just and equitable relief for the state's breach of its positive duties. In this vein, Fiss has argued that the incentive which drives settlement, namely maximising the satisfaction of the parties' preferences, runs contrary to the court's mandate to 'do justice', which is the 'ultimate aspiration' of the process of interpreting and actualising the values embodied in the Constitution.[67] The efficiency and expediency of settlement means it might 'often produce peace but leave justice undone'.[68] Secondly, the rationale that settlement promotes compliance through consensus has been criticised on empirical grounds, with the 'voluminous post-decree litigation' in structural reform litigation offered as proof of 'the lack of fidelity to court decrees in general and, in some

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65 Colin S Diver, 'The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions' (1979) 65 Virginia Law Review 43, 78. See further Judith Resnick, 'Judging Consent' (1987) 1987 University of Chicago Legal Forum 43, 63–65.

66 Diver (n 65) 78.

67 Owen Fiss, 'Justice Chicago Style' [1987] University of Chicago Legal Forum 1, 8. See further Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (YUP 2003) 117.

68 Fiss (n 67) 2.

cases, to parties' willingness to violate consent decrees as well'.[69] There is also cause for concern that 'bargaining in the shadow of the law'[70] can distort the dynamic of negotiation, aggravating inequalities in bargaining power and resources through the background threat of expensive litigation and its uncertain outcome.[71]

A more fundamental objection to court-approved remedies has characterised settlement as the strategic leveraging of judicial authority for private interests. Proponents of settlement focus on its contractual element and downplay the judicial element on the basis that the parties are not being bound to anything they did not voluntarily agree to. However, the significance of judicial approval as an exercise of public power cannot be overlooked: approval transposes a private contract into an enforceable court order backed by the threat of contempt.[72] As the South African Constitutional Court has recently confirmed, a court-approved settlement 'is an order like any other [and] will be interpreted like all court orders'.[73] The parties are given 'priority in the courthouse queue' through a right to return to court which avoids the need to institute litigation to enforce the agreement.[74] The objection to court-approved remedies is not merely that the court is being used as a 'registry of obligations'[75] but rather that the court is being leveraged to change the legal status and practical effects of a private contract between the parties. Fiss argues in this regard that consent decrees

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[69] Resnick (n 65) 70–71.

[70] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal 950.

[71] Fiss (n 67) 8–11.

[72] ibid 3. In the South African context, see *Eke v Parsons* 2016 (3) SA 37 (CC) [31].

[73] *Eke* (n 72) [29].

[74] Resnick (n 65) 64–65.

[75] *Mansell v Mansell* 1953 (3) SA 716 (N) 721.

'constitute an appropriation of public power' because the '[p]arties who enter a consent decree are trying to use the judicial power for their own purposes without recognizing the procedural limitations on the exercise of that power'.[76]

The legal significance and practical implications of this transposition from contract to court order raise concerns about the court's role in approving or rejecting a settlement. The first concern is that judicial approval of a settlement does not necessarily involve the kind of decision-making that should ground and justify the court's exercise of discretionary remedial power. Judicial approval 'substitutes contract for trial and judgment'[77] and thus does away with the process by which the court would normally bring the imperative and constraints identified in Sections II and III to bear on the exercise of discretionary remedial power. Judges can become complicit in the appropriation of their public power by private parties, thereby undermining the legitimacy and authority of that power.[78] There is a risk of judicial overreach where the court approves a settlement that is overly broad or casts the court in a supervisory role that is inappropriate in the circumstances. Sandler and Schoenbrod observe in this regard that 'overly broad consent decrees work an inappropriate shift from judicial protection of the plaintiffs—in their status as rights-holders—to judicial protection of plaintiffs in a new status—as beneficiaries of a contract'.[79] At the same time, there is an equally significant, and perhaps more probable, risk that the court-approved remedy under-realises rights. This is a particular concern where the interests of the parties, which drive settlement, may exclude adequate consideration of the interests of rights-holders who are

[76] Fiss (n 67) 4.

[77] ibid 3.

[78] ibid 14–17; Resnick (n 65) 100.

[79] Sandler and Schoenbrod (n 67) 115.

absent from the negotiations. In this instance, the appropriation of the court's public power diminishes the constitutional vision constituted by the state's positive duties, and the court fails to discharge its constitutional mandate to ensure just and equitable relief. Unreflective judicial approval may therefore be insufficiently responsive to both the constraints and the imperative which should guide the court's exercise of discretionary remedial power.

The second concern relates to the practical implications of these risks for the judicial role. Having bypassed the adjudication process in which the court establishes a breach of the state's positive duties, the settlement is not based on an authoritative interpretation of rights and may therefore 'leave the court without an adequate foundation for subsequent interventions'.[80] By transforming the settlement into a court order, the court cannot easily backtrack on the approved remedial plan without undermining the authority of court orders and jeopardising its legitimacy. Modifications can more easily be made where unforeseen obstacles arise or circumstances change during implementation, but fundamental defects in the original agreement are not easily overcome. If the court is called on to enforce a defective agreement, it cannot revisit its decision to approve the settlement for, to borrow Fiss' metaphor, 'water can not rise higher than its source'.[81] The settlement may therefore constrain the court to a remedial plan that overreaches or under-realises rights.

These two concerns focus attention on the key question for purposes of this discussion, namely what the court's role is—and should be—in exercising discretion to approve or refuse a settlement. The South African Constitutional Court has favourably referred to 'a less formalistic approach' to approving settlements as 'the usual practice in

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[80] Fiss (n 67) 2.

[81] ibid 12.

most divisions of the High Court of South Africa'.[82] Judicial approval is given by the court 'simply say[ing] the agreement, or those of its terms that do lend themselves to being part of a court order, are made an order of the court'.[83] However, Madlanga J was quick to qualify that this informal approach 'in no way means that anything agreed to by the parties should be accepted by the court and made an order of court...A court must thus not be mechanical in its adoption of the terms of a settlement agreement'.[84] Instead, the court should exercise its discretion in a 'stewardly manner', which might require an insistence that terms of the settlement are changed or even an outright rejection of the settlement.[85]

The increasing reliance on settlement in South African public interest litigation has not received extensive academic treatment, at least insofar as the remedial implications of settlement are concerned.[86] My case study in Chapter Six on the education litigation run by the LRC features several court-approved remedies which illustrate some of the concerns raised in this discussion. In *Madzodzo*, repeated non-compliance with court-approved remedial plans exposed the fact that the government's consent had not been accompanied by a genuine intention to comply. Securing a well-reasoned judgment from the court was a crucial breakthrough in this regard, as Goosen J not only exposed and rebuked the government's intransigence, but also gave explicit judicial recognition to the

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82 *Eke* (n 72) [14] (Madlanga J).

83 ibid.

84 ibid [25] (Madlanga J).

85 ibid [74] (Madlanga J).

86 Pioneering works that have turned attention to the role of settlement in South African public interest litigation include Cameron McConnachie and Chris McConnachie, 'Concretising the Right to a Basic Education' (2012) 129 South African Law Journal 554; Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Atlantic Philanthropies 2014); Ann Skelton, *Strategic Litigation Impacts: Equal Access to Quality Education* (Open Society Foundations 2017); Faranaaz Veriava, *Realising the Right to Basic Education: The Role of Courts and Civil Society* (Juta 2019).

fact that basic infrastructure like desks and chairs formed part of the right to education. *Centre for Child Law* illustrates a more problematic side of settlement in appropriating the court's authority to enforce a private agreement. Acutely aware of its power to dictate the remedy in settlement, the LRC leveraged settlement in anticipation of the government's continued non-compliance. Although the remedy later received explicit approval in *Linkside*, settlement avoided serious reflection on whether it is appropriate for a judicial remedy to tolerate the continuing failure of the state to fulfil rights if relief can be secured by other means. My contextualised evaluation of the court's exercise of discretionary remedial power in these cases makes a timely contribution to the question of the court's role in approving settlement agreements.

There has been more intense scrutiny of the judicial role in court-approved remedies in the US, where consent decrees are commonplace in structural reform litigation. In spite of the ubiquity of consent decrees across many areas of the law, Judith Resnick's study of judicial involvement in formulating, approving, entering and enforcing consent decrees reveals a 'problematic, tension-ridden, and vague conception of that role'.[87] Surveying past case law and commentary, she notes conflicting views of whether the court has discretion to approve or refuse entering consent decrees but traces a general shift in emphasis towards increased judicial control over consent decrees, such that the judge 'cannot simply "sign-off" without examining some of the underlying claims and the basis of the court's authority'.[88] As in South Africa, there is a discourse of judges acting as guardians or stewards of the public interest, but Resnick expresses concern that the 'tradition—at least up until recently—has been for judges to do little

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87 Resnick (n 65) 44.

88 ibid 59–60.

when entering consent decrees'.[89] While Fiss advances a principled objection to consent decrees as an appropriation of public power in the service of private interests, Resnick's scepticism of their utility and legitimacy stems from the quality of judicial involvement with consent decrees at the time of their entry.[90]

In the typology developed in this section, court-approved remedies pose the most pressing questions for the court's exercise of discretionary remedial power. The court is called on to decide whether to approve or refuse a remedial plan that has resulted from out-of-court negotiation between private parties. Not only has the court had no involvement or oversight over the formulation of the remedial plan, but its exercise of discretion does not follow from a judgment that authoritatively sets out the state's positive duties and establishes the breach that necessitates the implementation of systemic relief. Where the practice of approving settlements is reduced to rubber-stamping or a 'ritualistic dance',[91] the risks of judicial overreach or under-realising rights are magnified as the court is not responsive to the constraints and imperative that should guide the exercise of its discretionary power. Moreover, the extended remedial process that is paradigmatic to the enforcement of positive duties makes it likely that the court-approved remedy will require subsequent involvement from the court during implementation. Unreflective approval of an inadequate or defective remedial plan makes the court complicit in an inappropriate leveraging of the court's remedial power.

While registering unease about court-approved remedies as defined here, these concerns do not necessarily require courts to always reject lending their approval to settlement agreements. Instead, the concerns raised above underscore the importance of

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[89] ibid 85.

[90] ibid 102.

[91] ibid 93.

discretion for ensuring the appropriate exercise of constitutional remedial power. Rather than unreflectively approving settlement agreements, courts should scrutinise the remedial plan formulated by the parties to ensure it constitutes just and equitable relief. Discretion to refuse a settlement—either as an objection to certain terms or as a wholesale rejection—is indispensible to ensuring an appropriate exercise of constitutional remedial power. This discretion therefore goes hand-in-hand with the court's responsibility to ensure its public power is not appropriated to satisfy the interests of the parties but rather to enforce the state's positive duties in human rights.

2. Court-*Facilitated* Remedies

The second form that the exercise of discretionary remedial power can take is the approval of a remedial plan that results from court-ordered negotiations between the parties. In contrast to court-approved remedies discussed above, here the court has adjudicated on the merits of the case, delivering a judgment that authoritatively interprets the constitutional right at stake and establishes a breach of the state's positive duties. The court then orders the parties to negotiate about the systemic relief that needs to be implemented to fulfil rights, in the hope that an agreement can be reached which the court will then confirm as an order of court. The court or its delegate may assume some role in the negotiation, but judicial involvement remains minimal as the emphasis is on the parties formulating and agreeing on a remedial plan. A failure to reach consensus means the court will then assume a more intrusive role in remedial formulation—a prospect that makes negotiation more conducive to reaching consensus.

While court-facilitated remedies retain the advantages of consensus-based remedial formulation, the negotiation proceeds on a more secure footing than court-approved remedies for several reasons. Firstly, negotiations are based on the solid foundation of the court's judgment on the merits, providing authoritative constitutional parameters for the formulation of a remedial plan. This focuses negotiations on the clear goal of ascertaining what systemic relief is required to remedy the breach identified by the court, and thus helps protect against the promotion of the parties' interests at the expense of similarly situated rights-holders. Secondly, the court's involvement can promote a more equal playing field between the parties by safeguarding against power imbalances that may distort the outcome of negotiations. In this way, the court can promote more meaningful and equal participation by the parties in remedial formulation. Court-facilitated remedies therefore address many of the concerns discussed above in relation to court-approved remedies, as its process of remedial formulation makes the court well-placed to assess the adequacy of the remedial plan agreed by the parties before exercising discretion to approve or reject it.

This does not, however, mean that a court-facilitated remedy will always secure these benefits. It promotes participation and consensus in remedial formulation while also positioning the court to make an informed assessment of the adequacy of the agreed remedial plan, but its success is dependent on the exercise of discretionary remedial power. There remains a risk that the court will fail to scrutinise the remedial plan and unreflectively approve it as an order of the court. The deliberative remedial strategy of 'meaningful engagement', developed by the South African Constitutional Court in their leading eviction cases[92] and subsequently gaining some traction in other jurisdictions,[93]

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[92] For a sense of the early casuistic development of 'meaningful engagement', see the following South African jurisprudence: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) (*Joe Slovo I*); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC) (*Joe Slovo II*); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC). For an analysis of more recent 'meaningful engagement' jurisprudence on evictions, see Brian Ray, 'Evictions, Aspirations and Avoidance' (2013) 5 Constitutional Court Review 173; Jackie Dugard, 'Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing' (2013) 5 Constitutional Court Review 265.

has been criticised on this ground. It therefore offers a good illustration of the risks and rewards of discretionary remedial power as it pertains to court-facilitated remedies.

'Meaningful engagement' was first used as remedy[94] in *Olivia Road*[95] where the Constitutional Court warned against separating the procedural and substantive aspects of rights. Yacoob J, writing on behalf of a unanimous court, held that it is essential for a municipality to first engage meaningfully with residents before rendering them homeless through an eviction order, grounding this requirement in the state's positive duty to take 'reasonable steps' to realise the constitutional right to housing as required by section 26(2) of the South African Constitution.[96] Importantly, he set out normative parameters for the process that gave substantive content to 'meaningful engagement'. In this case, the process of meaningful engagement was successful, as the parties reached agreement that the City would not eject the occupiers, but would instead provide alternative accommodation while the unsafe buildings were upgraded. Meaningful engagement therefore facilitated 'a participatory, contextualised solution to the impasse which had developed'[97] between the City and the affected residents.

However, the strategy of meaningful engagement has not always yielded successful results, as illustrated by *Joe Slovo*.[98] This case concerned an application by organs of state

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[93] Most notably in India. See, for example, *Sudama Singh v Government of Delhi* (2010) 168 DLT 218.

[94] The roots for 'meaningful engagement' had been laid down in the earlier case of *Port Elizabeth Municipality v Various Occupiers* (n 92). Sachs J argued that respectful face-to-face engagement can help protect the dignity of those being evicted by encouraging both parties to find mutually acceptable solutions.

[95] *Olivia Road* (n 92).

[96] ibid [17] (Yacoob J).

[97] Sandra Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement"' (2012) 12 African Human Rights Law Journal 17.

[98] *Joe Slovo I* (n 92). Five different judgments were handed down, each following a different reasoning to reach the same decision as reflected in the order of the Court.

for the large-scale eviction of residents in the Joe Slovo informal settlement in order to facilitate a major housing development in the area. The government asserted that an in situ upgrade was not feasible in spite of residents' concerns that relocating to temporary accommodation would disrupt their established links to schools and employment and cut them off from key public services such as transport. The Court noted the contestation around whether an in situ upgrade was feasible but avoided engaging with this factual dispute on the basis that it was 'not for the courts to tell the government how best to comply with its obligations'.[99] This deference was shown to the government in spite of finding that there had been no 'coherent or adequate process of consultation with the occupiers'[100] leading up to the eviction proceedings, with 'major failures in communication' causing a breakdown of trust between authorities and the community.[101] The Court nevertheless concluded that these shortcomings were not so grave as to render the implementation of the housing plan unreasonable to the extent of denying the eviction order.[102] To ensure the relocation process treated residents with dignity and respect, the Court ordered ongoing engagement as a remedial safeguard. With hindsight, however, it became clear just how inadequate the engagement process with the residents leading up to eviction had been, as it later emerged that an *in situ* upgrade not only viable but in fact became the most likely plan for the redevelopment.[103] In a follow-up judgment, the eviction order was discharged in light of these changed circumstances, with the Constitutional Court observing, with a defensive use of double negatives, that it

[99] ibid [253] (Ngcobo J).

[100] ibid [301] (O'Regan J).

[101] ibid [378] (Sachs J).

[102] ibid [302]-[304] (O'Regan J).

[103] *Joe Slovo II* (n 92) [30]. For an analysis of the political developments that accompanied this shift, see Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 Constitutional Court Review 223.

‘would not have made the ejectment order had it not found that relocation could not be said to be unnecessary’.[104]

While the *Olivia Road* case illustrates the potential for meaningful engagement to enhance deliberation and participation in remedial formulation, the *Joe Slovo* litigation points to the risk that the requirement to meaningfully engage becomes a superfluous remedial safeguard that distracts the court from its constitutional mandate to provide just and equitable relief for the state’s breach of its positive duties. As Liebenberg points out, there is a ‘real danger that meaningful engagement as an adjudicatory strategy may descend into an unprincipled, normatively-empty process of local dispute settlement’ because ‘[t]here is no guarantee that the process or outcome of engagement between communities and authorities will respect and vindicate relevant constitutional rights’.[105] Unless courts demonstrate a readiness to scrutinise the settlements reached through meaningful engagement, countering deliberative inequalities where they exist and ensuring the remedial plan will provide systemic relief for the breach of the state’s positive duties, they risk rubber-stamping an order that under-realises the infringed rights as they were authoritatively interpreted in the judgment which preceded the negotiations.

3. Court-*Prompted* Remedies

The exercise of discretionary remedial power commonly takes the form of a court-prompted remedy. Having established a breach of the state’s positive duties, the court order simply declares this finding and leaves the government to formulate its own remedial plan that is typically not subject to approval by the court. The court’s finding

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[104] *Joe Slovo II* (n 92) [29].

[105] Liebenberg (n 97) 19.

therefore prompts the government to comply with its constitutional obligations but the task of ascertaining and implementing systemic relief is entrusted to the government in what can be described as a kind of 'remedial abstention' on behalf of the court.[106] The court's trust in the government's willingness and competence to do this is signalled by the fact that the remedial plan developed by the government is not automatically subject to approval by the court. However, the court may retain supervisory jurisdiction over the case to enable the parties to return to court if they wish to challenge the adequacy of the government's plan. It is therefore useful to outline the two main types of court-prompted remedy to illustrate what conditions might call for the retention of supervisory jurisdiction.

In its weakest form, a court-prompted remedy takes the form of a declaratory order which simply declares the unconstitutionality of the current state of affairs with the expectation that the government will respond by acting to remedy the breach identified by the court. While often criticised as a weak or 'toothless' remedy because it does not effect any direct legal change,[107] a declaratory order can be useful for clarifying the content and scope of the state's positive duties, which may be all that is necessary to prompt or motivate the government to act on those duties. However, a declaratory order might only be capable of initiating a political process that results in structural reform where the government has simply been inattentive to their duties or where there is a political deadlock. Given the absence of any robust accountability mechanism, a court should be confident in the government's willingness and capacity to fulfil its positive duties when choosing a declaratory order. Liebenberg therefore argues that a 'purely declaratory order is only appropriate when a court has good grounds for believing that

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[106] Buckholz and others (n 20) 797–800.

[107] Michael Bishop, 'Remedies', *Constitutional Law of South Africa*, vol 1 (2nd edn, Juta 2014) 176.

the State understands its obligations, and that it will take effective and expeditious steps to fulfil the obligations described in the order'.[108] Without these ideal conditions in place, however, a declaratory order may be ineffective in securing constitutional compliance. Its virtue—deference to the legislature and executive as a demonstration of implicit trust in their willingness and capacity to fulfil their positive duties—can become its weakness where the conditions are not conducive to a declaratory order. Misplaced trust in compliance where there is clear evidence of incompetence or intransigence can be a fatal flaw in a declaratory order. As the Canadian Supreme Court observed in *Little Sisters*, 'declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance'.[109] Yet while a simple declaratory order on its own may be insufficient to enforce the state's positive duties, there is room for strengthening declarations with supplementary remedial strategies, such as supervisory jurisdiction, to ensure they are fit for purpose.

The need for the retention of supervisory jurisdiction gestures towards the stronger, and increasingly mainstream, form of court-prompted remedy for enforcing the state's positive duties: the structural interdict. Like other forms of injunctive relief, a structural interdict entails a directive requiring the state to undertake certain actions, but it is distinct due to the supervisory role that is retained by the court. This retention of supervisory jurisdiction makes the structural interdict ideally suited to remedying systemic violations in institutional settings, as the court can monitor the implementation of its positive directives without the parties needing to institute fresh litigation to ensure compliance. As identified in Chapter Two, the structural injunction has been the

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[108] Liebenberg (n 62) 408.

[109] *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 [258] (Iacobucci J).

pioneering remedial tool of public law litigation in the US, although reliance on government-formulated plans has had mixed success. The limits of remedial abstention by the court is perhaps best illustrated by the persistent failure of defendant institutions to present adequate remedial plans in school desegregation cases like *Swann v Charlotte-Mecklenburg Board of Education*.[110] Structural interdicts have also been eagerly embraced by the Indian Supreme Court, especially in public interest litigation. In the Right to Food litigation, for example, the Supreme Court appointed Commissioners to monitor the government's implementation of its series of interim orders. A striking remedial innovation was its design of so-called 'umbrella orders' that set out the lines of accountability for ensuring compliance with orders, under the ultimate supervision of the Supreme Court itself.[111] This innovation makes full use of the supervisory function of structural interdicts in overseeing the implementation of systemic relief.

In contrast to the US and Indian experiences, the Canadian Supreme Court and South African Constitutional Court have been reluctant to grant structural interdicts in view of the proactive role it demands of the court. The appropriateness of supervisory orders split the Supreme Court in the leading Canadian case of *Doucet-Boudreau*, with the majority relying on its broad remedial powers under section 24(1) of the Charter to justify setting deadlines and requiring the government to report back to the court on its progress with constructing minority language schools.[112] The reporting requirements were considered necessary for 'enforcing the full and prompt vindication of...rights after

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[110] Buckholz and others (n 20) 799.

[111] *People's Union for Civil Liberties v Union of India* Indian Supreme Court Writ Petition (Civil) 196 of 2001. See further Right to Food Campaign Secretariat, 'Supreme Court Orders on the Right to Food: A Tool for Action' (Right to Food Campaign 2008) 16-18 <http://escrj.southasianrights.org/front/view_document/58> accessed 6 December 2018.

[112] *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3.

a lengthy history of government inaction'.[113] In spite of the affirmation in *Doucet-Boudreau* that supervisory orders fall within the remedial jurisdiction of the court, structural injunctions remain rare in Canada. In *Minister of Health v Treatment Action Campaign*, the South African Constitutional Court refused to resort to a structural interdict on the basis that '[t]he government has always respected and executed the orders of this Court. There is no reason to believe that it will not do so in the present case.'[114] While there was in fact good reason[115] to expect continued intransigence from a government known for its AIDS denialism, the Constitutional Court felt uncomfortable requiring the government to report on its progress with implementing its order. While the Constitutional Court retained supervisory jurisdiction in a number of its early cases,[116] its use of the structural interdict has remained sparing.[117] However, the High Courts in South Africa have made more extensive use of structural interdicts, as illustrated by the case study in Chapter Six.

4. Court-*Selected* Remedies

A court-selected remedy involves the adoption, modification or synthesis of remedial options proposed by the parties. The court's adoption of a remedial plan formulated by one of the parties most closely resembles the court's traditional remedial role in bilateral dispute resolution that is strongly party-controlled, with the 'winning' party usually being

[113] ibid [63] (Iacobucci and Arbour JJ).

[114] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) [129].

[115] See David Hausman, 'When and Why the South African Government Disobeys Constitutional Court Orders' (2012) 48 Stanford Journal of International Law 437, 437–438.

[116] See, for example, *August v Electoral Commission* (1999) 3 SA 1 (CC); *Sibiya v Director of Public Prosecutions: Johannesburg High Court* 2005 (5) SA 315 (CC); *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC).

[117] See Bishop (n 107) 181–193.

granted the relief as requested. In spite of its unobtrusiveness, the acceptance of one party's remedial plan in its totality is no less an exercise of discretionary remedial power than the court's modification of a remedial proposal or its synthesis of several proposals. However, a modified or synthesised remedial plan is a more visible exercise of discretion as it makes the details of the court's remedial decision-making explicit. Courts seldom give reasons for granting the relief requested by the 'winning' party, but reasons will generally be given for any modifications made. Given the complexity and specificity of remedial plans for enforcing the state's positive duties, the variations made by the court could be minor adjustments, such as the timing of reporting deadlines, as well as more major changes such as the scope of systemic relief.

A striking recent example of a carefully reasoned modification of a remedial plan is the judgment of Roberson J in the South African case of *Agri Eastern Cape v MEC for the Department of Roads and Public Works.*[118] After carefully considering the draft orders presented by both parties, she substantially approved the applicants' remedial plan but subjected it to a paragraph-by-paragraph assessment, giving considered attention at every step to the objections raised by the government and providing reasons for any changes to be made. Some aspects of the remedial plan were rejected on principled grounds, such as inappropriately restricting the prerogative of the executive[119] or limiting the discretion of the court to make subsequent costs orders.[120] Other modifications were more minor edits aimed at tightening and polishing the court order as a coherent remedial plan. For instance, Roberson J deleted one paragraph of the proposed plan for being 'unnecessary

[118] *Agri Eastern Cape v MEC for the Department of Roads and Public Works* 2017 (3) SA 383 (ECG).

[119] ibid [43.8].

[120] ibid [41.5].

and unwieldy'[121] and rearranged the sequence of some other paragraphs.[122] These detailed modifications to the applicant's proposed remedial plan were a manifest exercise of discretionary remedial power—considered attention was given to the government's objections in relation to each aspect of the remedial order, and clear reasons were given for every change incorporated in the final version.

5. Court-*Introduced* Remedies

Where the court considers the remedial options presented by the parties to be inadequate or inappropriate, it can introduce an alternative remedy of its own accord. A court-introduced remedy is a more proactive form of discretionary remedial power as the court looks beyond the relief that the parties requested, but it remains responsive to the particularities of the case in determining what just and equitable relief requires in the circumstances. For example, the relief proposed by the parties may fail to capture the systemic implications of the breach established in the case. This would happen where the government might wish to unduly limit the scope of systemic relief while the successful claimants might give inadequate consideration to the interests of similarly situated rights-holders. The strategic nature of litigation means the parties may not formulate their prayer for relief with the goal of systemic compliance in mind. The court may then exercise its discretionary remedial power to introduce an alternative remedy that goes beyond the narrow interests of the parties to also promote the interests of similarly situated rights-holders. The adversarial, party-controlled dynamic of litigation does not detract from the court's responsibility to scrutinise the parties' remedial proposals for

[121] ibid [43.5].

[122] ibid [44].

potential systemic problems that have been overlooked, and to exercise discretionary remedial power by proposing an alternative remedy that is mindful of the systemic effect of the state's breach of its positive duties. The court should ideally ask the parties to address its concerns about systemic compliance and benefit from hearing oral argument on the court-introduced remedy before ordering it.[123]

6. Court-*Imposed* Remedies

The most extensive judicial control over remedial formulation takes the form of a court-imposed remedy that entails the judicial confirmation or modification of a remedial plan formulated by a special master (or panel of experts) appointed by the court. Court-imposed remedies can be a valuable method of remedial formulation to address the paradigm remedial puzzle posed by positive duties. It is ideally suited to situations where the parties cannot reach agreement on a remedial plan, but the process of remedial formulation would benefit from both specialised expertise and the participation of a wide range of stakeholders. Given the limits of the court's capacity and expertise, a special master or panel of court-appointed experts is well-placed to undertake this resource-intensive task of remedial formulation. The case study in Chapter Five on the Campaign for Fiscal Equity litigation demonstrates these benefits of a court-imposed remedy while also exploring the contestation around this form of discretionary remedial power.

Reference to special masters or court-appointed experts should not amount to judicial abdication.[124] First, the court sets the scope of the special master's mandate and therefore controls the extent of his role in remedial formulation. Depending on the

[123] Bishop (n 107) 46, 86.

[124] Buckholz and others (n 20) 807.

remedial challenges posed by a particular breach, the master may be charged with addressing one aspect of the remedial plan, or the court may invite the master to make more comprehensive remedial recommendations. Secondly, the court can stipulate requirements for the process that should be followed, such as facilitating the participation of *amici curiae*, government institutions and other stakeholders. Finally, the court retains the power to reject, modify or confirm the recommendations of the master. As with court-approved remedies and court-facilitated remedies, the court should not unreflectively accept the recommendations made by the special master but rather satisfy itself that the remedial plan provides just and equitable relief. The court therefore retains control at every stage of remedial formulation—setting the scope of the master's mandate, directing the process it should follow, and ultimately deciding the final form of the remedial plan.

B. The Fluidity of the Forms of Discretionary Remedial Power

The typology developed above reflects the diversity of forms that the exercise of discretionary remedial power can take. There are varying degrees of judicial involvement in remedial formulation but the discretionary nature of remedial power means that the court always retains *ultimate* control over the remedy that is made an order of court. The typology further draws attention to the fact that remedial formulation is often a collaborative process, drawing in a range of actors—court-appointed delegates such as a special master, the parties to the litigation and other stakeholders such as government agencies and *amici curiae*. In responding to the remedial challenges posed by a particular breach, the court therefore has a variety of strategies for remedial formulation and can engage in the kind of experimentalism that Sabel and Simon advocate:

> The court need not choose between deriving remedies from ambiguous substantive norms on the one hand and deferring to manifestly unreliable executives on the other. Instead, it can try to create a process in which the stakeholders collaboratively derive standards, procedures for revising them, and mechanisms for accountability for those subject to them. The court can then facilitate implementation of these standards and procedures.[125]

Whatever form the exercise of discretionary remedial power takes, however, it should always be responsive to the imperative and the constraints set out in this chapter, ensuring that just and equitable relief is provided for the state's breach of its positive duties.

The diverse forms of discretionary remedial power do not mean that its exercise in a particular case will always fall squarely or exclusively within one of the six types outlined above. Rather, the exercise of discretionary remedial power is fluid because it is responsive to the challenges that may arise during the implementation of systemic relief. The extended remedial process characterised in Chapter Two requires continued judicial involvement in the implementation and enforcement of systemic relief, but the remedial challenges encountered as litigation progresses may call for a modulation in the exercise of discretionary remedial power. This modulation may differ depending on whether the *same* court is engaged in sustained oversight over compliance through an extended remedial process or whether an *appellate* court intervenes in the remedial process. The diversity of remedial possibilities available to a court of first instance is undoubtedly wider than the scope for an appellate court to interfere with the remedial discretion of the court of first instance. The Campaign for Fiscal Equity case study in Chapter Five provides an excellent example of such a modulation in the exercise of discretionary remedial power. The remedial process began with a court-prompted remedy[126] but the government failed to formulate an adequate remedial plan and the parties could not agree

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[125] Sabel and Simon (n 63) 1089.

[126] *Campaign for Fiscal Equity v State of New York* 100 NY2d 893 (NY 2003).

on what reforms were required to comply with the constitutional parameters set by the court. The remedial process therefore culminated in a court-imposed remedy in which court-appointed referees drew on the participation and expertise of a wide range of stakeholders.[127] While the trial court subsequently confirmed the recommendations made by the court-appointed referees, the Court of Appeals held that this constituted judicial overreach.[128] The progression of the Campaign for Fiscal Equity litigation therefore illustrates both the diversity and the fluidity of the exercise of discretionary remedial power.

This fluidity is also apparent in the remedial borrowing that can occur as innovative remedial strategies find application in new cases. A particular kind of remedial device might be formulated as the result of one form of discretionary remedial power, but subsequently adopted in another case through the exercise of a different form of discretionary remedial power. The South African case study in Chapter Six illustrates this fluidity in remedial borrowing. The appointment of an independent auditor in *Madzodzo*[129] was a court-*approved* remedy that resulted from an out-of-court settlement, but it inspired the applicant's proposal of appointing a team of independent monitors in *Black Sash* which was subsequently granted by the Constitutional Court.[130] This remedial innovation of an independent monitor was a court-*approved* remedy in unreported High Court litigation that became a court-*selected* remedy in the Constitutional Court. The Constitutional Court cited *Madzodzo* as authority for the appointment of the Auditor-

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[127] See Report and Recommendations of the Judicial Referees in *Campaign for Fiscal Equity v State of New York* (30 November 2004) <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 1 June 2018.

[128] *Campaign for Fiscal Equity v State of New York* 8 NY3d 14 (NY 2006).

[129] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

[130] *Black Sash* (n 12).

General,[131] but did not comment on this shift from a party-devised remedial innovation that was *approved* by the High Court without reasons, to being an accountability-enhancing device *selected* by the Constitutional Court as an 'exceptional' remedy.[132]

Conclusion

This chapter has offered a focused account of the judicial role in the remedial context. Its central thrust has been to emphasise the responsive nature of the court's exercise of discretionary remedial power. It identified a triad of constraints (democratic legitimacy, institutional competence and judicial independence) that courts should be responsive to if they are to avoid over-reaching in their exercise of discretionary remedial power. In keeping with the constructive aim of this thesis, however, my account offered a strengthened conceptualisation of the constitutional mandate that courts have to enforce the state's positive duties. The entrenchment of the state's positive duties in human rights represents a strong recognition of the state's duty to promote positive freedom and the court's role in giving tangible meaning and full expression to constitutional values. If courts are insufficiently responsive to this imperative, there is a risk that rights will be under-realised. In responding to this tension between the triad of constraints and the imperative represented by the constitutional mandate, courts are not walking a judicial tightrope but are instead faced with a range of remedial possibilities within the appropriate scope of their discretionary remedial power. To further nuance my account of the responsive nature of discretionary remedial power, I developed a typology that mapped out the diversity and fluidity of forms that its exercise can take. This typology of

131 ibid [71] fn 37.

132 ibid [51] (Froneman J).

discretionary remedial power and the range of appropriate remedial possibilities available to the court point to the need for principled remedial decision-making. In Chapter Four, I develop a normative account of principled remedial decision-making that demonstrates how courts, having scoped out a range of *appropriate* remedial possibilities, can *optimise* their exercise of discretionary remedial power.

CHAPTER FOUR

REMEDIAL PRINCIPLES AS OPTIMISATION REQUIREMENTS

[T]he important matter, having diagnosed what it is that renders discretionary jurisdiction inevitable, is to identify what are the optimum conditions for the exercise of discretion, because where we cannot be sure of being right, we can at least do what we can to obtain the best conditions for decisions.[1]

Introduction

Chapter Three explored the central tension that characterises the exercise of discretionary remedial power: on the one hand, courts are constrained by the limits of their constitutional legitimacy, institutional competence and judicial independence, but on the other hand, they are bound by their strong constitutional mandate to enforce the state's positive duties and to provide just and equitable relief where the state has failed to fulfil rights. I accordingly identified the two risks inherent in the discretionary nature of remedial power, namely the risk of judicial overreaching and the risk of under-realising rights. However, I argued that discretion also serves a valuable, indeed indispensable, function, as it enables courts to navigate this central tension as it plays out in a particular case, ensuring that they discharge their constitutional mandate through an appropriate exercise of remedial power. Importantly, I argued that courts are not walking a judicial tightrope when scoping out the extent of their appropriate remedial jurisdiction. This is because a particular case is unlikely to yield only one or two remedial options but rather a range of appropriate remedial possibilities from which the court can then discern what it considers to be the best option. I further developed a typology of discretionary remedial power to capture the diversity and fluidity of forms that its exercise can take, thereby

[1] HLA Hart, 'Discretion' (2013) 127 Harvard Law Review 652, 664.

pointing to the importance of well-reasoned remedial decision-making across all types of remedial formulation.

This chapter zooms in to examine more closely the range of appropriate remedial possibilities available to a court when enforcing the state's positive duties, thus presenting a finer-grained analysis of the exercise of discretionary remedial power. The focus shifts from a broad perspective on the judicial role in exercising discretionary remedial power to the specific principles that courts should optimise in remedial decision-making. Put simply, how should courts decide what remedy would be *best* when faced with a range of *appropriate* remedial possibilities for enforcing the state's positive duties? The aim of this chapter is, accordingly, to develop an evaluative framework based on the principles that should guide discretion in remedial decision-making. These remedial principles will then serve as a framework for evaluating the remedial innovations featured in the case studies that constitute Part II of the thesis.

The chapter begins in Section I by arguing that the judicial duty to give reasons for decisions extends to the court's choice of remedial relief, and that this duty is fortified in the context of discretionary remedial power. To answer the question of what kinds of reasons should be given to justify remedial decision-making, I examine the distinction between rules and principles as two kinds of normative constraints on discretion. I conclude that principles should preferably provide the reasoned basis for justifying discretionary remedial decision-making. In Section II, I apply Robert Alexy's understanding of principles as 'optimisation requirements'[2] to the remedial context by articulating four remedial principles: (1) the Principle of Effective Relief; (2) the Principle of Systemic Compliance; (3) the Principle of Institutional Responsiveness; and (4) the Principle of Institutional Complementarity. Section III then explains how remedial

[2] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2010) 47.

decision-making should involve prioritising and optimising these four competing principles within the context of a particular case. An optimal remedy would not only reflect the relative weights accorded to each principle, but also realise *all* principles to the greatest extent possible. This reasoning process for prioritising and optimising my four remedial principles within a particular case forms the basis of my framework for evaluating remedies. Section IV calls for greater remedial innovation to optimise these four remedial principles, thereby pointing forwards to the promising remedial strategies featured in the case studies in Part II.

I. Justifying Discretionary Remedial Decision-Making

A. The Judicial Duty to Give Reasons for Remedial Decisions

There is a growing acceptance across common law jurisdictions that there is a duty on courts to give reasons for their decisions, as part of a general conception of procedural fairness.[3] The judicial duty to give reasons also frequently has a statutory or constitutional source,[4] but the rationale for the duty is consistent across all sources and can be grouped as a set of three reasons.[5] Firstly, the duty is recognised as an incident of the right to appeal, since the trial court's reasons for arriving at a decision form the basis of an

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3 The judicial duty to give reasons has become increasingly established in common law jurisdictions, although some judges and academics still argue that, while certainly the norm and even a common law ideal, there is no strict duty to provide reasons. However, the main point of contention is the scope and implications of the duty to give reasons, rather than its existence *per se*. See Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 369–376; Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (6th edn, Juta 2013) 731; Hock Lai Ho, 'The Judicial Duty to Give Reasons' (2000) 20 Legal Studies 42; Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38 Melbourne University Law Review 482.

4 The duty is often inferred from the right to a fair trial or explicitly set out in legislation regulating judicial conduct.

5 Bosland and Gill (n 3) 490–501.

effective appeal. Indeed, the failure to give reasons is itself a possible ground of appeal.[6] Secondly, a broader duty to provide reasons is considered a function of due process, focusing judges' minds to ensure considered attention is given to all relevant evidence and arguments and thereby enabling the clear and consistent development of the law. Litigants are accordingly not left in the dark as to why they won or lost their case. Lastly, the duty to give reasons is considered an aspect of the principle of open justice, whereby 'justice should not only be done, but should manifestly an undoubtedly be seen to be done'.[7] It is therefore a facet of judicial accountability since the duty to articulate reasons curbs arbitrary and unconstrained decision-making.

The court's duty to give reasons for its decisions includes justifying its choice of remedial relief.[8] This aspect of the duty to give reasons is largely overlooked in the received remedial paradigm where, as discussed in Chapter Two, the remedy often neatly derives from the breach such that there is little need to explain the choice of relief granted. However, when enforcing the state's positive duties in human rights, the choice of remedy is not self-evident. As established in Chapter Two, relief for the state's failure to fulfil rights is generally characterised by an openness of remedial possibilities—the court has a range of appropriate remedial options from which to choose, hence the discretionary nature of its remedial powers. Indeed, the judicial duty to provide reasons is fortified in this context of discretionary remedial power, since the subjectivity of discretion underscores the importance of due process and open justice. The risk identified in Chapter Three that discretionary remedial power may indulge unconstrained decision-making implies a greater need for accountability. A well-reasoned decision

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[6] Ho (n 3) 46.

[7] *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 (KB) 259 (Lord Hewart CJ).

[8] Kate Hofmeyr, 'A Central-Case Analysis of Constitutional Remedial Power' (2008) 125 South African Law Journal 521, 531.

clarifies why the court considered one remedy better than the other available remedial possibilities, thereby justifying its discretionary exercise of remedial power. Kent Roach explains this as follows in his seminal work on *Constitutional Remedies in Canada*:

> In short, there are many plausible interpretations of what makes a remedy appropriate and just. Simply concluding that a remedy is appropriate and just disguises the complex and value-laden task of devising remedies. Judges must…explain what, in their view, makes a remedy appropriate and just. They may not always agree, but their explanation will, at least, provide a standard by which to evaluate the exercise of remedial discretion.[9]

If courts have a duty to give reasons for their choice of remedial relief, the logical question which follows is: what kinds of reasons? In other words, what are the normative constraints that should form the basis for a court's justification of its exercise of discretionary remedial power? This chapter answers this question by identifying four remedial principles that should guide discretionary reasoning when enforcing the state's positive duties. By justifying their remedial decision-making with reference to these principles, courts can demonstrate that their discretion is exercised according to clear normative constraints.

B. The Value of Principled Remedial Decision-Making

Kent Roach's analysis of the nature of remedial discretion offers an excellent starting point for answering this question of what kind of normative constraints should guide remedial decision-making.[10] Examining remedies for violations of the Canadian Charter,[11] Roach outlines three types of discretion: strong discretion, rule-based discretion, and principled remedial discretion. The first two categories lie at either extreme: strong

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[9] *Constitutional Remedies in Canada* para 3.120 (R 15 November 2009).

[10] Kent Roach, 'Principled Remedial Discretion Under the Charter' (2004) 25 Supreme Court Law Review 101.

[11] Charter of Rights and Freedoms, enacted in Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c.11.

discretion designates the absence of any principles or rules constraining judicial discretion, while rule-based discretion refers to the paradoxical situation of discretion being 'over-governed by self-executing categories and rules'.[12]

Both of these forms of discretion are problematic. Strong discretion, Roach observes, 'sits uneasily with the ideals of the rule of law and the concept that where there is a right, there must be a remedy.'[13] Reasons are considered superfluous given the absence of any rules or principles with reference to which the decision can be explained.[14] This means that although a decision reached through the exercise of strong discretion can be criticised according to external standards such as fairness, the court cannot be criticised for failing to reason according to principles or rules, for there are none binding it.[15]

Whilst recognising the danger of unconstrained and arbitrary decision-making that can result from a lack of principles or rules, Roach argues that rule-based discretion can be equally problematic. Following Dworkin, Roach understands rules as 'applicable in an all-or-nothing fashion'[16] such that as long as the conditions for the rule are met, it is to be applied without further reflection as to whether the underlying purposes of the rule are vindicated in that particular case.[17] For this reason, the categorical approach of rule-based discretion ensures greater certainty in the exercise of remedial power but can have counter-productive consequences owing to its insensitivity to context.

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[12] Roach, 'Principled Remedial Discretion' (n 10) 102. Although 'rule-based discretion' sounds self-contradictory, there is some discretion involved in applying rules—most obviously, the question of whether or not a rule is applicable to the case in question.

[13] ibid 108.

[14] ibid 109.

[15] ibid 108.

[16] Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 24.

[17] Roach, 'Principled Remedial Discretion' (n 10) 109.

Roach's discussion of *Halpern v Attorney General of Canada*[18] offers a valuable illustration of the dangers of rule-based discretion. In this gay marriage case, the Ontario Court of Appeal adhered so strictly to the rules for suspending a declaration of invalidity laid down by the Supreme Court in *Schachter v Canada*[19] that it failed to adequately consider whether the particular case before it, although not falling within any of the three categories identified in *Schachter*, was nevertheless better suited to a suspended declaration of invalidity. Roach's criticism of the *Halpern* decision does not turn on whether he thinks the declaration of invalidity should have been suspended or not in that case. Rather, his point is that rule-based discretion led to the 'mechanical application of the *Schachter* guidelines' without any 'discussion of the contested principles' that should have been central to the choice of remedy.[20] The self-executing rules therefore disclosed the possibility of an alternative decision based on deeper reflection about the underlying principles for suspending declarations of invalidity.

Rejecting both strong discretion and rule-based discretion, Roach instead advocates for the exercise of a third type of discretion which he calls principled remedial discretion. The exercise of principled remedial discretion involves the contextualised application of general principles to a particular violation,[21] where a principle is understood in the Dworkinian sense as something 'which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.'[22] There may be multiple principles at stake in any particular case, and the exercise of discretion

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[18] *Halpern v Attorney General of Canada* (2003) 65 OR (3d) 161 (CA) (*Halpern*).

[19] *Schachter v Canada* [1992] 2 SCR 679 (*Schachter*).

[20] Roach, 'Principled Remedial Discretion' (n 10) 137–138.

[21] ibid 102.

[22] Dworkin (n 16) 26.

involves the contextual determination of their relevance and relative weights. Principled remedial discretion therefore provides normative constraints for decision-making but does not produce clear-cut answers. Controversy about remedial decision-making may well remain, but such disagreement turns on the application of clearly articulated principles to a particular violation.

The value of principled remedial discretion can be illustrated with reference to *Minister of Home Affairs v Fourie*.[23] In this gay marriage case, the South African Constitutional Court was faced with the same remedial choice as the Ontario Court of Appeal in *Halpern* discussed above, namely whether a declaration of invalidity should take immediate effect or be suspended pending legislative intervention. Unlike the categorical adherence to rules in *Halpern*, however, the South African Constitutional Court in *Fourie* identified general principles to be weighed up when deciding what form of remedial relief would be best in the circumstances. Importantly, the Constitutional Court was agreed as to what principles were relevant but was split as to the relative weights that should be accorded to them, with the result that O'Regan J dissented from the majority's decision to suspend the declaration of invalidity.

Writing for the majority, Sachs J argued, firstly, that Parliament was better placed to ensure 'same-sex couples are brought in from the legal cold',[24] and secondly, that interim arrangements put in place by the Court would constitute a stop-gap mechanism giving same-sex unions 'a twilight and impermanent character out of keeping with the stability normally associated with marriage'.[25] He therefore concluded that a suspended declaration of invalidity was the best remedy in the circumstances, but laid down 'certain

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[23] *Minister of Home Affairs v Fourie* 2006 (1) 524 (CC) (*Fourie*).

[24] ibid [138].

[25] ibid [154].

guiding principles of special constitutional relevance'[26] that Parliament should consider when making legislative reforms as well as a prophylactic measure should Parliament fail to remedy the defect within the period of suspension.[27]

O'Regan J's dissent is noteworthy for her careful articulation of the relevant principles which guided the majority's exercise of remedial discretion, and her reasoned disagreement with their application. Whilst acknowledging the importance of the doctrine of the separation of powers, O'Regan J argued that it cannot be relied on to 'avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint.'[28] The court's interim arrangements would not affect the choices available to Parliament, she observed, but it would ensure the constitutional rights of gay and lesbian couples were protected pending Parliamentary intervention.[29] She was therefore of the opinion that the declaration of invalidity should have immediate prospective effect.

The *Fourie* case demonstrates that principled remedial discretion prompts judges to give robust reasons for their remedial choices, thereby clarifying the principles that ought to guide the exercise of remedial discretion and justifying their application of those principles to the particular case before them. While judges may disagree on the relative weights that should be accorded to these principles in the circumstances, their discretion is subject to normative constraints that serve to legitimise their remedial choices. For this

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[26] ibid [148].

[27] If Parliament failed to cure the under-inclusiveness of the common law and the Marriage Act within the prescribed period of suspension, Sachs J stipulated that the words 'or spouse' would be read into section 30(1) of the Marriage Act after the words 'or husband'. *Fourie* (n 23) [157]-[159].

[28] ibid [170].

[29] ibid [173].

reason, *Fourie* serves as a good foil to the exercise of rule-based discretion that dictated the choice of remedy in *Halpern*.

C. Normative Constraints on Discretion: A Matter of Degree or Kind?

Roach's categories of discretion have been criticised by Kate Hofmeyr on the ground that 'discretion is a matter of degree and thus there are no bright lines distinguishing rule-based from principled, fettered from unfettered or, indeed, strict from broad discretion.'[30] She therefore argues that exercises of discretion do not differ in kind, but only in degree. On this basis, she proposes that 'a central-case analysis of discretion…better illuminate[s] the nature of constitutional remedial power.'[31] Her central-case analysis is based on two variables, represented as two axes, that determine how constrained or unconstrained discretion is. The standards axis concerns the range of choice open to the decision-maker in the exercise of power, while the review axis concerns the extent to which the decision is reviewable.[32] The central case of discretion—that is, when discretion is 'strongest'—is represented by the point of intersection between the axes such that discretion is subject to the widest choice and is least reviewable.[33] The more tightly constrained discretion is, the further along towards the periphery of the axes it falls. While Hofmeyr distinguishes between procedural and

30 Hofmeyr (n 8) 526.

31 ibid 527.

32 ibid 531.

33 ibid.

substantive norms on the standards axis, it is important to note that she includes both rules and principles among these applicable norms.[34]

The distinction between rules and principles is significant as it lies at the heart of the apparent disagreement between Hofmeyr and Roach. Roach's categories of discretion are based on the nature of the norms that constrain its exercise, whether rules (rule-based discretion) or principles (principled remedial discretion) or the absence of either rules or principles (strong discretion). He therefore differentiates exercises of discretion according to the *kind* of normative constraints being applied. Hofmeyr's central-case analysis, by contrast, differentiates exercises of discretion according to the *degree* of constraint. This is well illustrated by her standards axis, with the degree of discretion being determined by the presence or absence of standards and the clarity of those standards:

> As the constraints increase, so a given exercise of power will recede from the central case of discretion. To the extent that a decision-maker creates the standards applicable to a given determination, or is left to interpret a vague standard, her exercise of power will reflect a more central case of discretion.[35]

As noted above, Hofmeyr explicitly states that she includes both rules and principles among the standards that can constrain discretion, and instead draws a distinction between 'broad' and 'narrow' standards, where 'the former leave a greater amount of choice to the decision-maker than the latter, in respect of which there are fewer options compliant with the standard'.[36]

On closer examination, Hofmeyr's criticism of Roach's taxonomy appears to be based on a pseudo-conflict. Roach himself points out that his categories of discretion are not water-tight distinctions but that specific exercises of discretion may lie on the

[34] ibid. Hofmeyr does not, however, define rules or principles.

[35] ibid 532.

[36] ibid.

'borderline' between categories.[37] He further acknowledges a measure of fluidity in the way that one type of discretion may 'lean towards' another category:

> For example, a rule-based approach may lean towards principle to the extent that interpretation and application of the rules engages broader and more general questions about the purposes of the rules. A principled approach may lean towards strong discretion to the extent that it emphasises appellate deference to the trial judge's choice of remedy.[38]

In describing his analysis as a 'spectrum approach', one can infer that Roach understands discretion to be a matter of degree.[39] But crucially, it is the nature of the applicable normative constraints that affects the degree of discretion in a particular case, with rule-based discretion being highly constrained at one end of the spectrum and strong discretion being unconstrained at the other end of the spectrum.

Discretion, then, is a matter of degree, but the value of Roach's analysis lies in his observation that there is a qualitative difference between rules and principles as two kinds of norms that constrain discretion. This is where the genuine disagreement between Roach and Hofmeyr lies. Roach argues that principled remedial discretion is a more sound exercise of discretionary power than rule-based discretion, even though the former is not as tightly constrained as the latter. I illustrated this above by contrasting the approaches in *Halpern* and *Fourie*. Indeed, it is the flexibility of principled remedial discretion that is its strength. Hofmeyr's central case analysis, by contrast, presupposes that the more tightly constrained courts are in their exercise of remedial power, the less risky such discretionary power is and by implication, on her account, the sounder its exercise is. By taking as her point of departure the position that a central case of discretion is undesirably risky, Hofmeyr's analysis belies a bias towards constraining

[37] Roach, 'Principled Remedial Discretion' (n 10) 113.

[38] ibid.

[39] ibid.

rather than empowering courts in discharging their constitutional mandate to enforce the state's positive duties in human rights.

D. Alexy's Distinction between Rules and Principles

Robert Alexy's theory about the distinction between rules and principles further illuminates the respective positions taken by Roach and Hofmeyr.[40] Alexy observes that a common criterion for distinguishing rules from principles is that of generality, in terms of which rules are characterised as norms of low generality and principles as norms of high generality.[41] Hofmeyr appears to subscribe to this criterion of generality, evidenced by her inclusion of both rules and principles among the standards that constrain discretion to varying degrees, and her description of the axis as ranging from 'broad' to 'narrow' standards. The implication of conceptualising the distinction between rules and principles as one of degree is that rules would lie towards the periphery of her standards axis while principles would lie closer to the central case of discretion.

Alexy rejects this criterion of generality, however, as he argues that rules and principles are norms which differ in structure, with the result that 'the distinction…is a qualitative one and not one of degree'.[42] Principles, according to Alexy, are 'optimisation requirements' in the sense that they are 'norms which require that something be realised to the greatest extent possible given the legal and factual possibilities.'[43] Principles can

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[40] I apply Robert Alexy's distinction between rules and principles to the specific issue of discretionary remedial decision-making. For a different but instructive application of Alexy's distinction in the human rights context, see Fredman's use of Alexy in characterising positive duties as principles in order to argue that they are binding on the state: Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 70–90.

[41] Alexy (n 2) 45.

[42] ibid 48.

[43] ibid 47.

therefore be satisfied to varying degrees. What is factually possible depends on the particular context, while the scope of what is legally possible depends on the opposing principles and rules which are applicable.[44] Alexy contrasts rules as being more definitive in their application:

> [R]ules are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain fixed points in the field of the factually and legally possible.[45]

Alexy further distinguishes rules and principles according to how conflicts between norms are resolved. Because rules apply definitively, a conflict between two rules cannot be resolved through compromise or balancing. Instead, resolution must be imposed either by invalidating one of the rules or by reading in an exception to one of the rules, thereby effectively modifying the rule.[46] Principles, by contrast, can be satisfied to varying degrees such that the resolution of competing principles can be achieved by considering their relative weights in context. The question to be asked in the balancing process is: 'which of the requirements having *equal status in the abstract* had the *greater weight* in the *concrete case*?'[47] The principle which is deemed to outweigh the competing principle will take precedence in that case, but the competing principle remains valid and still applies albeit to a lesser extent in that instance. Alexy therefore describes the resolution of competing principles as establishing 'a *conditional relation of precedence* between the principles in light of the circumstances of the case'.[48]

Roach's categories of rule-based discretion and principled remedial discretion resonate with Alexy's theory that rules and principles are qualitatively different norms.

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44 ibid 48.

45 ibid.

46 ibid 49.

47 ibid 51 (emphasis in original).

48 ibid 52 (emphasis in original).

There is, however, one discrepancy worth pointing out for purposes of this discussion of specific principles for remedial design in Section II. Roach relies on the distinction between rules and principles as articulated by Dworkin, who specified that principles only apply in relation to individual rights and are thus to be distinguished from policies, which he considered to apply in relation to collective interests.[49] Alexy is critical of this narrower scope of application for principles, arguing that it is 'neither necessary nor desirable to tie the concept of a principle to that of an individual right.'[50] Alexy's insistence that principles should be unified by their distinctive structure of reasoning rather than their content is a sensible approach, as we shall see below in considering principles for remedial design, where principles relating to both individual rights and collective interests need to be balanced.

II. Four Remedial Principles

As noted above, the value of Roach's approach lies in his identification of rules and principles as two different kinds of norms that constrain discretion, and the strength of his argument is that principled remedial discretion is preferable to rule-based discretion. In the next two sections of this chapter, I build on Roach's key insight in two ways. Firstly, I identify four specific remedial principles which articulate 'optimisation requirements'[51] for the exercise of discretionary remedial power and therefore serve as evaluative criteria for remedial decision-making. I call these four principles the Principle of Effective Relief, the Principle of Systemic Compliance, the Principle of Institutional

[49] Dworkin (n 16) 82, 90.

[50] Alexy (n 2) 66.

[51] ibid 47.

Responsiveness and the Principle of Institutional Complementarity. It is important to acknowledge at the outset that my formulation of these principles has been influenced by other accounts of remedial choice—most notably those of Kent Roach,[52] Michael Bishop,[53] Sandra Liebenberg,[54] Susan Sturm[55] and Paul Gerwitz.[56] Notwithstanding the strong resonances with other contributions to the literature, my remedial principles have a tighter focus due to my emphasis on positive duties. My approach can also be distinguished from these other accounts by the kind of structured reasoning it follows as a result of adopting Alexy's logical structure of principles.

This points to the second way in which I build on Roach's work. I refine the balancing exercise that Roach associates with principled remedial discretion by drawing on the analytical clarity of Alexy's conception of principles. Alexy's sophisticated model for resolving competing principles is brought to bear on remedial discretion, thereby illuminating how courts should prioritise and optimise remedial principles when responding to the remedial challenges posed by positive duties. Alexy notes that the term 'principle' is often used indiscriminately in reference to a range of norms, such as values or goals, such that principles lack 'precise differentiation and systematic application'.[57] The analytical clarity of Alexy's conception of principles is an attempt to counter vague or facile uses of the term and to ensure greater rigour in the application of principles to concrete cases. One of the virtues of Alexy's definition of principles as 'optimisation

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[52] Roach, *Constitutional Remedies in Canada* (n 9).

[53] Michael Bishop, 'Remedies', *Constitutional Law of South Africa*, vol 1 (2nd edn, Juta 2014).

[54] Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010).

[55] Susan Sturm, 'A Normative Theory of Public Law Remedies' (1991) 79 Georgetown Law Journal 1355.

[56] Paul Gerwitz, 'Remedies and Resistance' (1983) 92 Yale Law Journal 585.

[57] Alexy (n 2) 45.

requirements'[58] is that it encourages a sharper formulation of specific principles. I accordingly formulate my four remedial principles below as clear imperatives – norms which can be satisfied to varying degrees, but which require realisation to the greatest extent possible given the factual and legal possibilities.

A. The Principle of Effective Relief

A remedy should provide effective relief to the successful litigant(s) before the court.

The first remedial principle that courts should optimise in remedial decision-making is the imperative that a remedy should provide effective relief to the successful litigant(s) before the court. Relief is effective when it is directed at vindicating the right that was breached and therefore adequately answers its purpose of *giving effect to* (that is, realising or accomplishing, rendering operative[59]) this right. Used in this sense, the effectiveness of relief is measured in relation to the right that it realises rather than any empirical impact (external effect) the remedy may or may not have.[60] The Principle of Effective Relief therefore reflects the fundamental importance of a substantive analysis of the right that has been breached to ensure the remedy grasps the content of that right. Providing

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[58] ibid 47.

[59] 'effect, n' (*OED Online*, OUP July 2018) <www.oed.com/view/Entry/59664> accessed 25 November 2018.

[60] The Principle of Effective Relief is a normative criterion for remedial decision-making and is therefore not directly concerned with the effectiveness or vindication of a remedy in the empirical sense of being successfully implemented. A remedy which optimised this remedial principle by giving maximal effect to the right at stake would—*if met with full compliance*—be effective in this empirical sense, but this fine distinction is an important one in view of my methodology. As discussed comprehensively in Chapter One, my case study method has the modest aim of identifying promising remedial strategies for enforcing the state's positive duties, and the evaluative framework I develop in this chapter is fit for this purpose. An evaluation of remedies with the more ambitious aim of determining what kinds of remedies have *in fact* been effective (or successful in implementation) would require an altogether different methodology and the inclusion of considerable empirical work.

Effective Relief to the successful litigant(s) is squarely focused on vindicating the right as implicated by the state's breach of its positive duties. This does not necessarily entail individualised relief as the litigant(s) could be individual rights-holder(s) and/or an institutional client representing the public interest. Effective Relief should be provided to those represented before the court who have successfully established a breach of their rights, whoever they may be. This remedial principle is therefore concerned about achieving the fullest vindication of rights, rather than the widest scope of relief.

Understood as an 'optimisation requirement', the Principle of Effective Relief underscores the argument made in Chapter Two about the importance of remedies for the full realisation of rights. The discussion on remedial equilibration illuminated the ways in which remedies control the value of rights, both in the immediate sense of their 'cash value' for successful litigants and in the longer run as remedial concerns and consequences iteratively shape the content and scope of rights. Particularly in the enforcement of the state's positive duties, remedies play a formative role in both constituting and concretising rights. The Principle of Effective Relief warns against rights being under-realised through remedial deterrence when 'judges' minds...shuttle back and forth between right and remedy'.[61] A remedy that optimises the imperative of Effective Relief is one that gives *maximal effect* to the right, as the remedial challenges posed by positive duties are not allowed to compromise our understanding of the right. This optimisation of the Principle of Effective Relief is captured by Michael Bishop's definition of effective relief as 'relief that leaves no gap between right and remedy: it makes the constitutional ideal a reality'.[62]

[61] Gerwitz (n 56) 679.

[62] Bishop (n 53) 67. Importantly, saying there should be no 'gap' between right and remedy is not the same as suggesting there should be a tight right-remedy interlock in the sense discussed in Chapter Two. The 'gap' discussed here relates to a discrepancy in the normative content between a right and remedy, not a flexibility in the choice of remedy for the breach of a right. That being said, there is a connection between

The Principle of Effective Relief is an optimisation requirement that courts must seek to realise to the greatest extent within the factual and legal possibilities of a particular case. This means that a remedy should always aim to give *maximal effect* to a right, leaving no 'gap' between right and remedy, but it may not always be possible to fully satisfy this imperative in every case. Alexy's model for resolving conflicting principles finds valuable application here in understanding why a remedy might not be able give maximal effect to a right. Firstly, optimisation of the Principle of Effective Relief may not be legally possible given the prioritisation of competing remedial principles as they apply in a particular case. While all four remedial principles are equally important in the abstract, a competing principle may hold more weight than Effective Relief within the particular context at hand. As discussed below, for example, the Principle of Systemic Compliance sometimes stands in tension with the Principle of Effective Relief, especially where optimising Effective Relief for the successful litigant(s) may run contrary to the interests of similarly situated rights-holders who are absent from proceedings.

Secondly, optimisation of the Principle of Effective Relief may not be factually possible owing to practical considerations that unavoidably constrain what relief can be provided to the successful litigant(s) before the court. Gerwitz has demonstrated the reality of remedial compromise using the example of school desegregation litigation in the US, observing how public resistance opened up a gap between right and remedy as courts began to approve imperfect remedies. My approach to prioritising conflicting remedial principles resonates with Gerwitz's 'interest-balancing' approach to equitable remedies in recognising that remedial effectiveness may not only be limited by

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the two: the flexibility of the right-remedy interlock creates the risk that a remedy might under-realise the right that has been breached, thus opening up a normative 'gap' between right and remedy.

unavoidable practical constraints (factual impossibility) but also because of a trade-off between effectiveness and competing remedial goals (legal impossibility). Gerwitz is critical of the lack of candour typically shown by courts where 'the claims of a resistant, unruly reality'[63] lead them to adjust their remedial aspirations of providing effective relief to the successful litigant(s) who have established a breach of the state's positive duties.[64] Understanding remedial principles as optimisation requirements provides the structured reasoning that is crucial for achieving the judicial candour that Gerwitz advocates. Courts should seek to give maximal effect to rights, and are required to justify any gap between right and remedy in terms of their prioritisation of competing remedial principles and unavoidable practical constraints.

B. The Principle of Systemic Compliance

A remedy should promote systemic compliance with positive duties.

The second remedial principle is an imperative to promote the state's systemic compliance with its positive duties. As observed in Chapter Three, remedial decision-making is a strongly responsive exercise—the court responds to the breach as established in the particular case before it.[65] The Principle of Systemic Compliance gives normative direction to this responsive task by requiring remedial decision-making to be responsive to the broader context and systemic implications of the state's breach.[66] Promoting

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[63] Gerwitz (n 56) 587.

[64] ibid 665–674.

[65] Hofmeyr (n 8) 529.

[66] Sandra Liebenberg's call for 'responsive remedies' reflects this recognition that the design of remedies for the state's failure to fulfil rights should be attentive to the broader contextual realities that lie beyond the narrow dispute before the court. See Liebenberg (n 54) especially ch 8.

systemic compliance therefore concerns the *scope* of relief. As established in Chapter Two, the consequences of a breach of the state's positive duties are seldom discrete and contained, but rather distributive and structural. The scope of relief accordingly needs to capture the 'number and diversity of interests implicated, and the depth and breadth of the impact' of the state's failure to fulfil rights.[67] This requires remedial decision-making to be contextually responsive so that the systemic implications of the state's breach can be fully captured in the scope of relief. Systemic Compliance is accordingly optimised by maximising the scope of relief provided for the state's breach.

Understood as an optimisation requirement, the Principle of Systemic Compliance requires a remedy to provide the *fullest scope of systemic relief* within the legal and factual possibilities of a particular case. As with all the remedial principles, however, optimisation may not always be possible. The legal and factual constraints which may prevent the optimisation of Systemic Compliance frequently arise from the very fact that remedial decision-making is a responsive exercise in which the court is limited by the procedural parameters of the particular case before it. Firstly, it may not be legally possible to maximise the scope of relief where a competing remedial principle is prioritised over Systemic Compliance. A common tension in the enforcement of the state's positive duties arises from a conflict between the Principle of Systemic Compliance and the Principle of Effective Relief. On the one hand, the imperative to promote Systemic Compliance requires sensitivity to the distributive trade-offs and knock-on effects of providing relief to the successful litigant(s) before the court. It therefore militates against the privileging of particular claimants before the court at the expense of similarly situated rights-holders who are not party to the litigation. However, without control over the choice of claimants or formulation of the claim, the court may

[67] Jeff King, *Judging Social Rights* (CUP 2012) 202.

choose to prioritise the provision of Effective Relief over the promotion of Systemic Compliance.

The South African Constitutional Court recently grappled with this conflict of principles in *Dladla v City of Johannesburg*.[68] The applicants challenged the constitutionality of the shelter rules at the temporary accommodation that the City had provided for them in terms of the Court's eviction order in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*.[69] The City argued that because the applicants were better off than many thousands of people living in the City, the limitations that the shelter rules placed on their rights were justified.[70] They therefore characterised the state's positive duty to fulfil the right of access to housing as a zero-sum game in which better treatment of one group (the applicants) necessarily implies worse treatment of another group (similarly situated rights-holders).[71] This comparative welfare argument essentially pitted the provision of Effective Relief to the applicants against the promotion of Systemic Compliance as represented by the competing interests of similarly situated, and even worse-off, rights-holders. Cameron J's concurring judgment engaged most rigorously with this tension, acknowledging the difficulty of the court's task: 'This is tough. There is a painful clash of principles here. But we do better to acknowledge it than to obscure it.'[72] He defended the prioritisation of Effective Relief by shifting focus from the abstract conflict to underscoring the responsive nature of the court's task in addressing the concrete terms of the particular claim brought by the applicants:

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68 *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC) (*Dladla*).

69 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

70 *Dladla v City of Johannesburg* (n 68) [82] (Cameron J).

71 ibid [86].

72 ibid [92] (Cameron J).

> A court should not have to determine in the abstract who are the worst off. A court is obliged to judge the claims of those who are before it on their own merits. If the comparative welfare of others, or their lack of it, could without more justify deprivation of benefits, this could imply a race to the bottom, where the hierarchy of the worse-off determines who is entitled to dignity. This could lead to infinite regressions of impoverishment and misery.[73]

In *Dladla*, the claim was formulated to establish a particular breach in relation to the applicants' rights, and did not attempt to address any systemic dimension of the state's positive duty to provide access to housing under section 26 of the Constitution. The Constitutional Court was therefore faced with the choice of providing Effective Relief to the successful applicants or providing no relief at all. The constraint of judicial independence discussed in Chapter Three means it would have been inappropriate for the Court to investigate, of its own accord, whether the state was in breach of its positive duty to provide access to housing in respect of the thousands of worse-off residents in the City (or, indeed, the entire country). By contrast, where a case is structured to establish a representative breach by combining individual claimants with a systemic claim in the public interest, the court is better placed to optimise Systemic Compliance. While there may still be a tension between Effective Relief and Systemic Compliance, both can be optimised through the use of a 'two-track remedy' as demonstrated by my case study in Chapter Six. The *Mud Schools*[74] case piloted a two-track remedial strategy in which the LRC represented a combination of individual schools acting in their own interests to secure urgent infrastructure improvements and an institutional client acting in the public interest to ensure similarly situated schools across the entire province would also receive relief. A two-track remedy is therefore structured to include an 'individualised track' which provides Effective Relief to individual claimants before the court, and a 'systemic track' which promotes Systemic Compliance with the state's positive duties. The ensures

[73] ibid [89] (Cameron J).

[74] *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* (ECB) unreported case no 504/10 (4 February 2011).

the remedy both gives maximal effect to rights and offers the fullest scope of systemic relief. Although the individual claimants may receive Effective Relief before similarly situated rights-holders reap the benefits of greater Systemic Compliance, this horizontal inequity is a temporary but necessary compromise that results from the responsive nature of the court's remedial role.[75]

The second reason that optimisation of Systemic Compliance may not be possible is that unavoidable factual constraints can limit the scope of systemic relief granted in a particular case. The complexity and contingency of ascertaining systemic relief means the court may only be able to promote Systemic Compliance through a partial intervention based on the limited information and resources it has at its disposal. As the CFE litigation covered in Chapter Five demonstrates, however, the court can compensate for its information deficit and limited resources by drawing on the expertise and capacity of the parties, other stakeholders and court-appointed delegates. Even though it may still not be factually possible to provide the fullest scope of systemic relief, these efforts realise the Principle of Systemic Compliance to the greatest extent possible in the circumstances.

Sabel and Simon's notion of the 'web effect' explains the value of contextualised problem-solving for promoting Systemic Compliance in spite of the unavoidable factual constraints that may make optimisation impossible.[76] The 'web effect' refers to a kind of 'positive polycentricity' in which the ramifications of the court's intervention on institutions and practices give rise to new rounds of interventions and corrections that,

[75] See Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response' (2016) 66 University of Toronto Law Journal 3, especially 43-47. Roach advocates for the use of suspended declarations and other dialogic devices as the systemic track of a two-track remedy. For a contrasting perspective on the use of suspended declarations of invalidity, see Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14 International Journal of Constitutional Law 584.

[76] Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015, 1080–1082.

over time, bring about greater systemic compliance.[77] The web effect demonstrates how sequential problem-solving through the course of litigation—even partial interventions based on limited information—can bring about reforms too complex to be addressed whole.[78] The extended remedial process which is paradigmatic to the enforcement of positive duties lends itself to this kind of incremental systemic reform, as the remedial plan can be recalibrated in light of new information about the broader context and systemic implications of the state's breach.

C. The Principle of Institutional Responsiveness

> A remedy should be calibrated to the underlying institutional reason for the state's failure to fulfil rights.

The third remedial principle requires remedial decision-making to be responsive to the institutional reason underlying the state's failure to fulfil rights. The rationale for this imperative is that calibrating a remedy to the institutional cause of non-compliance makes it more likely that relief will be implemented because it is fit for purpose. I use the concept of 'remedial mode' to describe this approach of calibrating a remedy to the institutional reason for non-compliance. The staple remedial mode of the law is the strongly coercive command-and-control approach which relies on top-down hierarchies and the imposition of fixed rules to compel compliance. This can be contrasted with a more reflexive remedial mode that uses deliberative and experimental strategies to incentivise and induce compliance.[79] Remedial mode therefore offers a range of

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[77] ibid 1080.

[78] ibid.

[79] See discussion in Chapter Two, Section II.B. See generally Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 Law and Society Review 239; Sabel and Simon (n 76).

institutional 'postures' or 'stances' that a court can adopt towards the government to coerce or induce compliance. Calibrating a remedy to the governmental failure causing the breach involves discerning what remedial mode is best suited to promoting accountability for compliance.

Roach and Budlender have put forward a compelling argument to this effect by drawing on Chris Hansen's identification of the three reasons which commonly underlie a government's non-compliance with constitutional standards: inattentiveness, incompetence and intransigence.[80] Each of these species of governmental failure calls for a different 'responsive technique'.[81] Roach and Budlender elaborate on this argument by adapting John Braithwaite's idea of regulatory pyramids[82] to the context of judicial remedies. Braithwaite's regulatory pyramids offer a model for guiding and justifying escalating state responses to non-compliance. Intervention starts with persuasive regulatory mechanisms that proceed on the assumption that the relevant actor is virtuous. If these softer strategies are ineffective, Braithwaite's model escalates the response to that of a deterrence framework on the assumption that the organisation is rational but recalcitrant. The pyramid model culminates in the imposition of punishment on the assumption that the organisation is either incompetent or irrational.[83]

Roach and Budlender argue that Braithwaite's model maps neatly onto Hansen's typology of inattentiveness, incompetence and intransigence, combining to offer guidelines for three levels of remedies. Where the constitutional breach can be attributed

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[80] Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 South African Law Journal 325.

[81] Chris Hansen, 'Inattentive, Intransigent and Incompetent' in S Randall Humm and others (eds), *Child, Parent and State: Law and Policy Reader* (TUP 1994) 232.

[82] John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002).

[83] ibid 32.

to the government's inattentiveness to the nature of their obligations, Roach and Budlender advocate a declaratory order with possible public reporting requirements.[84] Incompetence calls for the escalated response of mandatory relief over which the court retains supervision[85] and, for intransigent governments, a breach should be remedied with detailed mandatory interdicts enforced by contempt proceedings.[86] The choice between declaratory orders and mandatory relief is therefore ultimately dependent on the underlying reason for the constitutional breach.[87] Roach and Budlender's three-level model of remedies is a helpful guide to justifying remedial escalation based on the underlying reason for the state's failure to fulfil rights. A strongly punitive remedy would be inappropriate where an inattentive government has the political will to fulfil its positive duties, just as softer persuasive techniques would clearly be ineffective in the face of flagrant disregard for rights-holders affected by a constitutional breach. Their model demonstrates how political and institutional responsiveness in remedial decision-making serves a crucial function in promoting accountability for compliance.

However, their model is neither a *comprehensive* nor *determinative* blueprint for remedial decision-making. While it provides a rough guide to choosing a remedy that is institutional responsive, it is not a *comprehensive* guide for optimising remedial decision-making to promote accountability for compliance. This is because it can help with the broad question of remedial *choice* by selecting between different kinds of remedies (particularly declaratory orders and mandatory interdicts), but it does not cover the more detailed questions of remedial *design* which involves fine-tuning the specific features of

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[84] Roach and Budlender (n 80) 346–348.

[85] ibid 349–350.

[86] ibid 350–351.

[87] ibid 327.

the chosen kind of remedy. Understanding Institutional Responsiveness as an optimisation requirement offers a more refined calibration of remedial mode to the institutional reason for non-compliance. Rather than pairing the institutional reason with a pre-set menu of declaratory orders and mandatory interdicts, accountability for compliance can be optimised through a dynamic use of remedial mode which draws on a creative combination of coercive and reflexive techniques. By striking a more refined balance between incentives and sanctions, this dynamic use of remedial mode optimises accountability for compliance. The *Madzodzo* litigation covered in Chapter Six's case study demonstrates a dynamic use of remedial mode to promote accountability for compliance.[88] The court imposed a strict timetable for the provision of systemic relief but softened the inflexibility of this coercive order by allowing for extensions to be granted if the government adequately justified the need for additional time. The coercive dimension of an imposed timetable for relief set clear parameters for compliance but the option to apply for an extension encouraged greater transparency and collaborative problem-solving during the implementation process.[89]

By requiring a more dynamic and creative use of remedial mode to optimise accountability for compliance, the Principle of Institutional Responsiveness also encourages a more nuanced diagnosis of the institutional reason for the state's failure to fulfil rights. Hansen identified inattentiveness, incompetence and intransigence as the common reasons for non-compliance with constitutional standards, but this typology does not fully capture the range and complexity of institutional reasons that might underlie governmental failures to fulfil rights. The imperative to optimise Institutional Responsiveness calls for a more nuanced typology. Firstly, non-compliance may be

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[88] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

[89] See discussion in Chapter Six, Section IV.B.

traced back to a combination of reasons, rather than only one clear cause. As identified in Chapter Two, positive duties are particularly challenging to enforce where compliance requires co-operation among multiple actors, including institutions that are themselves complex structures which can only function effectively with good co-ordination between their 'moving parts'. Non-compliance may therefore stem from institutional dysfunction featuring a nuanced combination of inattentiveness, incompetence and intransigence by different officials within complex organisational structures.

This gestures towards the second way in which the typology can be nuanced. The three reasons of inattentiveness, incompetence and intransigence characterise non-compliance in psychological terms that are most appropriately used in relation to individual states of mind or capacities. As Simon and Sabel have observed, however, these psychological terms misconceive the institutional nature of the issues that commonly cause non-compliance.[90] Non-compliance is more frequently the result of political blockages in public institutions that have chronically failed to meet their positive duties, with top officials often conceding as much.[91] A typology confined to inattentiveness, incompetence and intransigence can attribute responsibility to individual low-level officials based on discrete episodes of misconduct, but this often falls short of establishing systemic misconduct or the ultimate responsibility of senior government officials against whom relief is sought.[92] Sabel and Simon accordingly advocate for a shift in focus from the mental states of individual officials to the systemic functioning of institutions. My case studies begin the work of nuancing Roach and Budlender's typology by bringing some of these institutional challenges to light: corruption in the form of

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[90] Sabel and Simon (n 76) 1095–1096.

[91] ibid 1062–1063. Note that this is a feature of both case studies in Part II of the thesis.

[92] ibid 1095.

irregular tenders (*Madzodzo*),[93] regulatory capture that compromises appointment processes (*Centre for Child Law*),[94] and compromised government institutions for whom the economic and political costs of compliance prevent reform (*Campaign for Fiscal Equity*).[95]

Finally, Roach and Budlender's model is not *determinative* of remedial choice because optimising Institutional Responsiveness may not be legally possible where a competing remedial principle holds more weight in the particular circumstances. For instance, the court may consider a mandatory order with extensive court oversight to be the optimal remedy where the state's breach poses a systemic threat of serious and irreparable harm to rights, even though the reason for the state's breach was simply inattentiveness to their positive duties for which a declaratory order is normally sufficient on Roach and Budlender's model. In other words, the Principle of Systemic Compliance might outweigh the Principle of Institutional Responsiveness in that particular case.

D. The Principle of Institutional Complementarity

A remedy should seek a complementary institutional division of constitutional labour for fulfilling rights.

The final remedial principle requires the enforcement of positive duties to be achieved through a complementary institutional division of constitutional labour.[96] Institutional

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[93] See discussion in Chapter Six, Section IV.B.4.

[94] *Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG). See discussion in Chapter Six, Section V.A.1.

[95] See discussion in Chapter Five, Section V.A.

[96] The phrase 'institutional division of constitutional labour' is borrowed from Daryl J Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 Columbia Law Review 857, 914. It captures the normative thrust behind the Principle of Institutional Complementarity in conceptualising all branches of

Complementarity can be defined as an institutional arrangement that draws on the comparative strengths of each branch of government in a collaborative remedial plan to fulfil rights. It is premised on a positive framing of the separation of powers that flows from the conceptualisation of the court's constitutional mandate developed in Chapter Three.[97] Rather than focusing on the safeguarding function that the separation of powers serves as a system of checks and balances to prevent the excessive concentration of state power in any one branch of government,[98] the Principle of Institutional Complementarity emphasises its empowering function in facilitating the state's constructive role of promoting positive freedom. The separation of powers is accordingly understood to enhance the quality and efficiency of governance by assigning different roles to each branch who have specialist expertise and capacity to perform their designated functions. With this rationale in mind, the Principle of Institutional Complementarity represents an imperative to draw on these comparative institutional strengths during remedial decision-making. Institutional Complementarity is optimised through an institutional arrangement the makes the *best* use of the comparative institutional strengths of each branch of government in a collaborative remedial plan for fulfilling rights.

The question posed by the Principle of Institutional Complementarity is therefore not simply what would pass as an *appropriate* institutional arrangement, but rather what would be the *best* institutional division of constitutional labour for enforcing the state's positive duties. To understand how this remedial principle operates as an optimisation requirement, it is important to clarify the relationship between the Principle of

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government to be engaged in the same constitutional labour of fulfilling human rights with each branch making a different, but complementary, institutional contribution.

[97] See Chapter Three, Section III.

[98] Liebenberg (n 54) 67.

Institutional Complementarity and the appropriate exercise of discretionary remedial power as scoped out in Chapter Three. Recall that the scope of appropriate remedial possibilities is determined by both the triad of constraints and the constitutional mandate to enforce the state's positive duties. By definition, then, an appropriate exercise of discretionary remedial power neither overreaches the limits of democratic legitimacy, institutional competence and judicial independence, nor under-realises rights. The Principle of Institutional Complementarity only operates *within* this appropriate scope of remedial possibility, guiding remedial decision-making to discern the *optimal* institutional arrangement from among the range of *appropriate* options. By implication, a complementary institutional division of constitutional labour should not cause remedial decision-making to 'slip back' into under-realising rights by giving the triad of constraints double application. As the Canadian Supreme Court has put it crisply, '[d]eference ends...where the constitutional rights that the courts are charged with protecting begin'.[99]

This risk of 'backsliding' prompts some clarification about what the best institutional division of constitutional labour for fulfilling rights might look like in any particular case. The Principle of Institutional Complementarity does *not* boil down to an imperative on courts to defer to the other branches of government in remedial decision-making. On the contrary, Institutional Complementarity seldom involves a frictionless institutional division of constitutional labour. By allocating a specialised function to the branch of government best institutionally equipped to perform it, the separation of powers does not envisage strictly demarcated boundaries between independent and uncoordinated branches of government. Instead, the separation of powers requires the cultivation of 'a relationship of mutual accountability, responsiveness and openness

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[99] *Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3 [36] (Iacobucci and Arbour JJ).

between the three branches, and between government and the public'.[100] Commenting on this dialogic process of interaction, Liebenberg argues that institutional friction is par for the course:

> Dialogic engagement in this context will frequently be characterised by disharmony and mutual resistance to an over-assertion of power by one branch. What is important, however, is that the branches of government remain engaged with each other in a manner which is open and respectful of the institutional strengths and weaknesses of each other. Through this process the limits of each branch's institutional power will be continually defined and redefined...[101]

Institutional Complementarity reminds us that the courts and other branches of government are engaged in the same enterprise of realising human rights, albeit on the basis of different institutional roles. The best institutional arrangement for enforcing positive duties may place the branches of government in constructive tension—not in an antagonistic power-struggle but rather in a collaborative effort, co-ordinated by the judiciary, to achieve their common goal of fulfilling rights.

While Institutional Complementarity does not require a frictionless institutional division of constitutional labour, there will normally be greater institutional strain where the legal and factual constraints of a particular case prevent the optimisation of this remedial principle. Firstly, it may not be legally possible to optimise Institutional Complementarity where a competing remedial principle is given priority. Such a conflict often arises in relation to the Principle of Institutional Responsiveness, where the underlying reason for non-compliance in a particular case compromises the institutional arrangement that would, in the abstract, make the best use of the comparative institutional strengths of the branches of government. Secondly, it may not be factually possible to optimise Institutional Complementarity given the institutional strengths and weaknesses of government institutions as they manifest in a particular case. The best

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[100] Liebenberg (n 54) 67.

[101] ibid 70.

institutional division of constitutional labour is not a static arrangement that can be pinned down and frozen in time, but must instead be discerned through a contextualised assessment of institutions at a particular point in time. The CFE litigation covered in Chapter Five illustrates this fluidity: the legislature was given the first opportunity to 'cash out' the constitutional standard of a 'sound basic education' in budgetary terms,[102] but when political deadlock between the legislature and executive thwarted compliance, the trial court resorted to an independent panel of referees to scrutinise the costing-out studies submitted by the parties.[103]

III. Prioritising and Optimising Remedial Principles

These four remedial principles—Effective Relief, Systemic Compliance, Institutional Responsiveness and Institutional Complementarity—together provide a guide for optimal remedial decision-making. Besides serving as justifying reasons that courts can draw on in support of their remedial decisions, the remedial principles also offer a framework for evaluating the court's exercise of discretionary remedial power. My case studies make use of this framework to illuminate innovative remedial strategies by analysing how well they prioritise and optimise the four remedial principles. Since my evaluative framework is based on Alexy's conception of principles as optimisation requirements, it is worth fleshing out the reasoning process by which competing principles should be prioritised and optimised. This reasoning structure underpins my evaluation of the innovative remedies featured in the case studies.

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[102] *Campaign for Fiscal Equity v State of New York* 100 NY2d 893 (NY 2003) (*CFE IIc*). See Chapter Five, Section III.B.

[103] Report and Recommendations of the Judicial Referees, *Campaign for Fiscal Equity v State of New York* (30 November 2004) <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 1 June 2018. See Chapter Five, Section V.

Alexy's approach to resolving competing principles is particularly useful for guiding the exercise of discretionary remedial power in the context of the state's positive duties. The openness of remedial possibilities for enforcing the state's positive duties underscores the need for a systematic approach to the exercise of remedial discretion. Alexy's theory provides this much-needed methodological rigour without diminishing the equally important flexibility that is the very rationale for remedial discretion. This flexibility lies in the contextualised application of remedial principles to establish their relative weights in a particular case. Remedial discretion is central to this balancing exercise precisely because of its contextual nature—the four remedial principles hold equal weight in the abstract but courts exercise discretion in assigning relative weights to them in a concrete case. The conditional relation of precedence among the four principles establishes the priorities for remedial decision-making in that instance.

The resolution of competing principles through this contextual balancing exercise does not remove the discretionary nature of remedial decision-making but it does offer a more structured reasoning process to guide the exercise of discretion. Indeed, it provides the optimal conditions for the exercise of discretionary remedial power, as called for by Hart:

> [T]he important matter, having diagnosed what it is that renders discretionary jurisdiction inevitable, is to identify what are the optimum conditions for the exercise of discretion, because where we cannot be sure of being right, we can at least do what we can to obtain the best conditions for decisions.[104]

As Hart observes, decisions reached through the exercise of discretion cannot be judged as unequivocally 'correct' or 'incorrect', but must rather be evaluated according to the manner in which the decision was reached. It is therefore more accurate to describe a decision as a 'sound' or 'unsound' exercise of discretion. The relevant question in making this evaluation is whether the exercise of discretion can be *justified* with good reasons

[104] Hart (n 1) 664.

based on the manner in which the decision was reached, not whether it is subsequently *vindicated* by a successful outcome in fact.[105] This is an especially important distinction in view of the fact that my remedial principles serve as normative criteria for my evaluative framework, not as empirical markers of success that can predict the likely impact of a remedy.

Given that the structured reasoning required by my remedial principles does not generate 'correct' or 'incorrect' answers, there might well be reasonable disagreement as to the relative weights to be attributed to each remedial principle on the facts and consequently to remedial decision-making in a particular case. But this would be disagreement of a familiar kind—indeed, the analogical reasoning required for the contextual application of these remedial principles lies at the heart of the common law tradition. By serving as justifying reasons for remedial decision-making, the remedial principles enhance the legitimacy of the court's exercise of discretion and contribute to a greater culture of justification.[106] This is particularly significant in light of the fact that the judicial duty to give reasons for decision-making is arguably reinforced in the context of discretionary remedial power. There may be disagreement, but the reasons for the disagreement should be clear.

While conceding that the contextual application of principles is not immune to controversy, Alexy nevertheless argues that the result of every correct balancing exercise gives rise to a derivative norm in the form of a rule under which that particular case gets

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[105] ibid 660. However, Hart does acknowledge that through successive exercises of discretion which are vindicated by results, we may begin to identify factors that should be considered when justifying future decisions. See ibid 665.

[106] A 'culture of justification' can be contrasted with a culture of authority, as it requires the exercise of public power to be legitimised through reason-giving rather than simple reliance on majority support. See generally Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 South African Journal on Human Rights 31; David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 South African Journal on Human Rights 11.

subsumed.[107] In other words, a conditional relation of precedence established among principles can be expressed as a rule that is valid where the same conditions arise in future. Without altogether dismissing the possibility of deriving rules for the exercise of discretionary remedial power, I would hasten to add the caveat that the formulation and application of rules in this way should always be umbilically linked to the principles from which they were derived. In this regard I echo Roach's criticism that the mechanical application of rules without deeper reflection about the underlying principles that inform them can result in poor remedial choices.[108] The preference for principles over rules as the kind of normative constraint on the exercise of remedial discretion is based on the flexibility afforded by principles in allowing greater contextual sensitivity in remedial decision-making. Rules significantly detract from that flexibility and should therefore remain secondary to principles in guiding the exercise of remedial discretion.

Finally, in keeping with Alexy's understanding of principles as optimisation requirements, it is worth reiterating that courts should seek to realise *all* four of these remedial principles to the greatest possible extent given the factual and legal possibilities of a case. What is factually possible and legally possible are both case-specific questions, but factual possibilities are pre-determined, fixed parameters that lie outside the court's control while legal possibilities are the result of the court's own determination. It is the scope of legal possibility that is particularly relevant to evaluating the exercise of discretionary remedial power, since it involves the resolution of the four competing remedial principles. An optimal remedy, on my evaluative framework, will therefore be

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[107] Alexy (n 2) 56.

[108] Roach, 'Principled Remedial Discretion' (n 10) 137–138.

one that reflects a 'conditional relation of precedence' between the principles, but at the same time realises *all* four principles as far as possible in that particular case.[109]

IV. Optimisation through Innovation

Understanding remedial principles as optimisation requirements is particularly well-suited to the enforcement of the states' positive duties. As discussed in Chapter Two, the paradigm remedial puzzle posed by positive duties cannot be accommodated within the received remedial tradition, with its fixed understanding of the right-remedy interlock. Courts need to look beyond the traditional remedial repertoire to find innovative ways of addressing the distinctive remedial challenges associated with positive duties. The imperative to realise all remedial principles to the greatest possible extent in every case encourages courts to be more proactive in crafting creative remedies. In short, the imperative of optimisation represents a call for greater remedial innovation. Rather than settling for any remedy within the range of appropriate remedial possibilities, courts are required to seek the optimal remedy for enforcing the state's positive duties. An appropriate exercise of discretionary remedial power is therefore necessary but not sufficient—it must also be exercised in a manner that optimises the four remedial principles.

My remedial principles underscore the potential rewards of discretionary remedial power, in keeping with the central aim of this thesis in affirming a constructive role for the court in enforcing the state's positive duties. Instead of asking how *little* will suffice to protect rights, the imperative of remedial optimisation provides an answer to the more ambitious question of how *much* courts can achieve within the appropriate exercise of

[109] Alexy (n 2) 52.

their discretionary remedial power. It is the discretionary nature of constitutional remedial power that enables remedial optimisation, providing flexibility for the contextualised balancing of competing remedial principles and the innovation of creative remedial strategies to realise all of these principles to the greatest possible extent in the circumstances. Discretion is a conduit for remedial innovation, channelling judicial imagination towards optimal remedies:

> Courts must not feel constrained by the traditional forms of remedies. Anything is possible. Courts must think outside the box. They must 'forge new tools' and 'shape innovative remedies' to ensure that, within the inevitable limitations they provide the most effective relief available. No, not 'available'. The most effective relief *imaginable*.[110]

The rewards of discretionary remedial power are exemplified through remedial innovation, when courts do not resign themselves to the readily available repertoire of established remedies but rather imagine new remedial possibilities that provide optimal relief for the state's failure to fulfil rights.

Conclusion

As the culmination of Part I, this chapter has directly answered the central research question of this thesis. I have argued that courts can optimise the exercise of discretionary remedial power through the contextualised prioritisation and optimisation of four remedial principles: (1) the Principle of Effective Relief; (2) the Principle of Systemic Compliance; (3) the Principle of Institutional Responsiveness; and (4) the Principle of Institutional Complementarity. Drawing on Alexy's understanding of principles as 'optimisation requirements', my account set out a structured reasoning process for crafting a remedy that is not merely appropriate but also optimal. I further argued that the imperative of optimisation calls for greater remedial innovation, as courts

[110] Bishop (n 53) 77 (footnotes omitted).

should not settle for selecting a remedy from the traditional remedial repertoire if better remedial possibilities can be imagined. In Part II, I turn to two case studies for inspiration as to how the exercise of discretionary remedial power can be optimised through innovation, thus offering a second—and complementary—answer to my research question. Using my remedial principles as an evaluative framework, I illuminate the potential of the innovative remedial mechanisms featured in the case studies for overcoming the paradigm remedial puzzle posed by positive duties.

Part II

INTRODUCTION TO PART II

Where observation is concerned, chance favours only the prepared mind.[1]

Part I of this thesis developed a normative account of how courts should exercise their discretionary remedial power to enforce the state's positive duties in human rights. Chapter Two clarified the relationship between rights, remedies and positive duties. I set out the paradigm remedial puzzle posed by positive duties, which exemplifies the remedial challenges involved in (1) ascertaining systemic relief; and (2) promoting accountability for compliance. I also underscored the importance of remedies for the full realisation of rights by foregrounding the way that remedial discretion mediates the reciprocal relationship between rights and remedies. Chapter Three explored the central tension that characterises the exercise of discretionary remedial power. My account offered a strengthened conceptualisation of the court's constitutional mandate to enforce the state's positive duties, but also acknowledged that this imperative stands in tension with the constraints imposed by the limits of the court's democratic legitimacy, institutional competence and judicial independence. I accordingly scoped out the range of appropriate remedial possibilities that lies between the two risks associated with discretionary remedial power: the risk of judicial overreach and the risk of under-realising rights. I further emphasised the responsive nature of the court's remedial role by developing a typology of discretionary remedial power that captures the diversity and fluidity of forms that its exercise can take. Part I culminated in Chapter Four's account of remedial principles as optimisation requirements. I argued that the exercise of

[1] 'Louis Pasteur', *Oxford Dictionary of Quotations* (8th edn, OUP 2014).

discretionary remedial power should involve the contextualised prioritisation and optimisation of four remedial principles: (1) the Principle of Effective Relief; (2) the Principle of Systemic Compliance; (3) the Principle of Institutional Responsiveness; and (4) the Principle of Institutional Complementarity.

This strong theoretical foundation developed in Part I prepares us with a heightened ability to glean insights from the case study material in Part II. My four remedial principles and the structured reasoning they require, provide an evaluative framework to draw out the potential of the remedial innovations featured in the case studies for addressing the paradigm remedial puzzle posed by positive duties. As explained in Chapter One, this framework is not rigidly superimposed on the case study material to generate clear-cut answers as to the success or failure of the featured remedial innovations. Instead, a careful balance is struck between theory-laden evaluation which uses the generalising language of my remedial principles and thick description which allows the case study material to 'speak' for itself. Indeed, the in-depth, contextualised exploration that is achieved through thick description provides essential grounding for future theoretical work in which the featured remedial innovations can be fleshed out for more generalised application. It provides exactly the kind of jurisdiction- and case-specific contextualisation that is often not viable in comparative analysis but is crucial when assessing the transplantability or generalisability of a remedial mechanism.

Chapter Five and Chapter Six both undertake a *within-case* analysis rather than engaging in a *cross-case* analysis. Each case study therefore has integrity in making a stand-alone contribution and does seek to draw comparative conclusions or explicit connections with its counterpart. Nevertheless, the two case studies are strategically paired in three important respects: (1) they represent a complementary but under-explored jurisdictional pairing; (2) they achieve thematic unity through a shared focus on the right to education; and (3) they feature serialised litigation which charts a clear trajectory of remedial development. As a result of this strategic pairing, there are strong resonances and instructive contrasts between the two case studies that give coherence to Part II. I will briefly tease out these dominant features by way of offering some signposts to guide the reading ahead.

Firstly, the juxtaposition of South African constitutional litigation with New York State constitutional litigation offers a fruitful but under-explored jurisdictional pairing. Courts in both jurisdictions have a constitutional mandate to enforce entrenched rights and are equipped with broad discretion to provide just and equitable relief where such rights are breached.[2] The strength of the mandate given to South African courts is clear from the transformative vision of the Constitution,[3] its pioneering entrenchment of justiciable socio-economic rights,[4] and explicit recognition of the state's duty to 'respect, protect, promote and fulfil'[5] all rights which are binding on 'the legislature, the executive, the judiciary and all organs of state'.[6] In the United States, many state Constitutions contain substantive provisions on social rights such as education, poverty, housing, shelter and nutrition.[7] The New York Constitution is no exception, and entrenched rights like education and welfare have been taken to generate strong positive duties on

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[2] See Chapter Three, Section I.

[3] See generally Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal of Human Rights 146; Pius Langa, 'Transformative Constitutionalism' (2006) 3 Stellenbosch Law Review 351.

[4] The Constitution entrenches a right to have access to adequate housing (s 26), the rights to have access to health care services, sufficient food and water, and social security (s 27), the rights of children to basic nutrition, shelter, basic health care services and social services (s 28), and the right to education (s 29).

[5] Constitution, s 7(2).

[6] Constitution, s 8(1).

[7] Burt Neuborne, 'State Constitutions and the Evolution of Positive Rights' (1989) 20 Rutgers Law Journal 881, 893.

the state.[8] State courts enjoy a much clearer constitutional mandate than federal courts[9] and have accordingly served as the constitutional setting for much social rights litigation in the United States.[10] Hershkoff and Loffredo have drawn out the implications of this strong constitutional mandate for placing state constitutional adjudication on a more equal footing with foreign adjudication under national constitutions:

> State courts, no less than state legislatures, serve as important 'laboratories of experimentation' in our federal system. We have seen that some state courts have made use of their traditional common law and equitable authority to devise an array of remedial strategies for the enforcement of state constitutional socio-economic rights. In certain respects, the approaches deployed by these courts resemble similar endeavors abroad, where national constitutional courts have confronted claims of socio-economic rights under their national constitutions. Though largely unheralded, the engagement of these state courts with positive rights antedates efforts abroad, and offers alternative strategies to those seen in foreign courts. These state practices deserve considerably more attention and credit.[11]

My jurisdictional pairing capitalises on this fact that US state courts, much like the High Courts in South Africa, serve as laboratories of remedial experimentation.[12]

Secondly, the two case studies achieve thematic unity through their shared focus on the right to education. The CFE litigation concerns the constitutional standard of adequacy guaranteed by a 'sound basic education' under Article XI, section 1 of the New York State Constitution.[13] The plaintiffs argued that the state's education financing system was failing to provide New York City public school students with the opportunity

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[8] Helen Hershkoff, 'Positive Rights and State Constitutions: The Limits of Federal Rationality Review' (1999) 112 Harvard Law Review 1131, 1135; Jeff King, 'Two Ironies about American Exceptionalism over Social Rights' (2014) 12 International Journal of Constitutional Law 572.

[9] Hershkoff (n 8).

[10] King (n 8) 597.

[11] Helen Hershkoff and Stephen Loffredo, 'State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis' (2011) 115 Penn State Law Review 923, 981–982.

[12] On the cross-fertilisation in remedial development between the South African High Courts and the Constitutional Court, see Helen Taylor, 'Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation' (2019) 9 Constitutional Court Review (forthcoming).

[13] Art XI, s 1 of the New York Constitution requires that '[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated'. This provision has been interpreted as requiring the state to provide a 'sound basic education'. See *Board of Education, Levittown Union Free School District v Nyquist* 57 NY2d 27 (NY 1982).

to obtain a 'sound basic education'. The LRC litigation also challenged the adequacy of the state's education provision, not directly in terms of budgetary allocation but rather in terms of the failure to provide basic facilities and resources to schools in the Eastern Cape province, South Africa. Each of the three streams of litigation covered in Chapter Six targets a different aspect of the right to education guaranteed by section 29(1) of the South African Constitution:[14] *Mud Schools* concerns school infrastructure; *Madzodzo* concerns school furniture; and the twin cases of *Centre for Child Law* and *Linkside* concern the appointment and payment of teachers.

However, both case studies emphasise how the inadequacy of the state's educational provision is rooted in deep structural inequality. The under-funding of inner city schools in New York gave rise to noticeable discrepancies in educational opportunities and quality between schools with mostly disadvantaged and ethnic minority students, and those schools in more privileged districts that drew from a wealthier, largely white student base. In the South African context, the infrastructure backlog at public schools in the Eastern Cape is the legacy of decades of deliberate under-funding for the education of Black children during apartheid. For this reason, both case studies situate the litigation within a longer historical perspective that captures these inequalities—the CFE litigation as part of the contested legacy of the US Supreme Court's 1954 decision in *Brown*,[15] and the LRC litigation as part of the apartheid legacy symbolically captured by the Bantu Education Act 47 of 1953. These inequalities are also an important dimension of the political and institutional blockages that undermine compliance in both case studies, with privilege being protected through local control

[14] S 29(1)(a) of the South African Constitution states that '[e]veryone has the right to a basic education, including adult basic education'.

[15] *Brown v Board of Education* 347 US 483 (1954) (*Brown I*); *Brown v Board of Education* 349 US 294 (1955) (*Brown II).* I refer to these two initial decisions together as '*Brown*'.

over education financing in the US and the autonomy of School Governing Bodies in South Africa. In the CFE litigation, the alignment of privilege with political power starved any political appetite for education financing reform,[16] while in the LRC litigation, the weak institutional functionality of the Eastern Cape Department of Education reflects the compounding of apartheid inequalities in social and managerial capital.[17] In both case studies, the failure to overcome these deep structural inequalities and political blockages means the education system risks becoming a 'revolving door of inequality'[18] rather than an empowering and equalising public good.[19]

Finally, the case studies are strategically paired for their structural similarities in taking the form of serialised litigation. Their serialised structure holds several benefits for my case study analysis. Most obviously, it exemplifies the extended remedial process that is paradigmatic to the enforcement of the state's positive duties.[20] The continuities between remedy and enforcement are seen in the iterative remedial process that unfolds as a result of the contingencies of implementation. This in turn demonstrates the lengthening and diversification of the court's involvement in the remedial process. The court's exercise of discretionary remedial power takes different forms over the course of litigation, beginning with more minimal judicial involvement in remedial formulation and culminating in far more interventionist involvement in response to non-compliance.

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[16] 'Unfulfilled Promises: School Finance Remedies and State Courts' (1991) 104 Harvard Law Review 1072, 1072.

[17] Edward B Fiske and Helen F Ladd, *Elusive Equity: Education Reform in Post-Apartheid South Africa* (BIP 2004) 66–67.

[18] David Hinojosa and Karolina Walters, 'How Adequacy Litigation Fails to Fulfill the Promise of Brown (But How It Can Get Us Closer)' (2014) 2014 Michigan State Law Review 575, 582. See also Nicholas Spaull, 'Poverty and Privilege: Primary School Inequality in South Africa' (2013) 33 International Journal of Educational Development 436.

[19] CESCR, 'General Comment No 13: The Right to Education' (1999) E/C.12/1999/10 [1].

[20] See Chapter Two, Section II.

These shifts illustrate the diversity and fluidity of forms that the exercise of discretionary remedial power can take, as captured by my typology developed in Chapter Three.

Most importantly, however, the serialised structure of litigation charts a trajectory of remedial development in each case study which can be clearly traced. In the CFE litigation, successive appeals at each stage of the litigation and a consistently split Court of Appeals reveal different prioritisations of the four remedial principles, and my evaluation draws out the implications of these disagreements for remedial decision-making. This remedial tug of war tracks a rise and fall in remedial optimisation—*CFE IIIa* represents a high point in remedial optimisation but this progress is pulled back by the Court of Appeals' retreat in *CFE IIIc*. The LRC litigation charts a more consistent upward trajectory in remedial development, partly enabled by the increasingly assertive role of the LRC in settlement negotiations which began each stream of litigation. Each case follows a clear pattern of remedial experimentation and refinement, but the three streams of LRC litigation together reveal an even clearer trajectory towards remedial optimisation. Notwithstanding these differences between the trajectories of remedial development in the two case studies, a prominent feature of both is that serialised litigation culminates with a resort to innovative remedial mechanisms to overcome non-compliance.

The case studies are structured in the same way to foreground these dynamics of remedial optimisation and innovation. Both chapters begin by situating the case study in its broader constitutional context (Section I) before providing a more specific introduction to the serialised litigation (Section II). The heart of each chapter evaluates the trajectory of remedial development through the extended remedial process: first addressing the challenges of ascertaining systemic relief (Section III), then the remedial mechanisms to promote accountability for compliance (Section IV), before the resort to remedial innovation as a response to persistent non-compliance (Section V). A conclusion consolidates my evaluations to reflect on how the exercise of discretionary remedial power was optimised through remedial innovation.

Chapter Five

Costing-Out a Sound Basic Education in New York City

Challenging as the previous issues are, in complexity they pale by comparison to the final question: remedy.[1]

Introduction

This chapter presents a case study of the innovative remedial mechanisms featured in the extended litigation run by the Campaign for Fiscal Equity (CFE) challenging the constitutionality of New York State's education financing system. The CFE litigation played out in three stages, in three courts, over a thirteen-year timespan, thus exemplifying the extended remedial process that is paradigmatic to the enforcement of the state's positive duties.[2] The trajectory of remedial development in this serialised litigation tracks the challenge of ascertaining the constitutional standard of education adequacy in budgetary terms, as well as the closely related challenge of promoting accountability for compliance with implementing the financing reforms required to meet this standard. The successive appeals and a consistently split Court of Appeals at each stage of the litigation reveal different prioritisations of my four remedial principles, and my evaluation draws out the implications of these disagreements for remedial decision-making. More constructively, these various remedial permutations reveal how greater optimisation of all four remedial principles enables the court to not only enforce the

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[1] *Campaign for Fiscal Equity v State of New York* 100 NY2d 893 (NY 2003) 925 (Kaye CJ).

[2] *Campaign for Fiscal Equity v State of New York* 86 NY2d 307 (NY 1995) (*CFE Ic*); *Campaign for Fiscal Equity v State of New York* 100 NY2d 893 (NY 2003) (*CFE IIc*); *Campaign for Fiscal Equity v State of New York* 8 NY3d 14 (NY 2006) (*CFE IIIc*). At each of the three stages of the CFE litigation, the case was first heard by the Supreme Court (the trial court), then the Appellate Division, before finally reaching the Court of Appeals. My evaluation focuses on the trial court decisions (which I refer to as *CFE Ia*, *CFE IIa* and *CFE IIIa*) and the Court of Appeals decisions (which I refer to as *CFE Ic*, *CFE IIc* and *CFE IIIc*) as well as a brief consideration of the strategic significance of the Appellate Division's finding in *CFE IIIb*.

state's positive duties in education financing within the *appropriate* scope of its discretionary remedial power but indeed, to do so through an *optimal* exercise of such power.

The case study is structured as follows. Section I situates the CFE litigation within the historical struggle for equal educational opportunity by highlighting the formative influence of *Brown v Board of Education*[3] on the three 'waves' of education financing litigation that have taken place over the last fifty years in the United States. This discussion traces several key shifts as litigators have searched for new ways to fulfil *Brown*'s promise of equal educational opportunity: from federal to state constitutional litigation, from equity to adequacy in education, and from negative duties to positive duties. Section II provides a brief overview of the educational inequalities that prompted the CFE litigation and the early remedial fault-lines that emerged in the Court of Appeals' first decision on the matter, *CFE Ic*. The splits on the Court of Appeals in this preliminary decision demonstrate how remedial concerns overshadowed even the threshold procedural question of whether the plaintiffs had a valid cause of action under the Education Article of the New York State Constitution.[4] Turning to the heart of the case study, Sections III-V explore the three main remedial challenges addressed by the courts in *CFE II* and *CFE III*. Section III grapples with the institutional division of constitutional labour involved in ascertaining, or cashing out, the constitutional standard of education adequacy in budgetary terms. Section IV evaluates the mechanisms used to promote accountability for compliance, identifying some of the shortcomings which failed to address the skewed political incentives in the legislature that would subsequently thwart progress in reforming the education financing system. Section V traces the

[3] *Brown v Board of Education* 347 US 483 (1954) (*Brown I*); *Brown v Board of Education* 349 US 294 (1955) (*Brown II*). I refer to these two decisions collectively as '*Brown*'.

[4] New York Constitution, art XI, s 1 (Education Article).

culmination of the CFE litigation as the state's persistent non-compliance prompted the trial court to appoint an independent panel of referees to scrutinise the 'costing-out studies' submitted by the parties. While this innovative remedial mechanism promised to break the political bind that had prevented reform, the Court of Appeals' ultimate retreat in the face of institutional friction makes for a disappointing denouement to the CFE litigation. Section VI brings the case study to a close with a brief postscript on the recently filed *NYSER* compliance litigation which highlights the high cost—quite literally—of the judicial retreat in *CFE IIIc*.[5]

I. Situating the CFE Litigation: The Search for New Ways to Fulfil an Old Promise

A. Brown's Legacy of an Unfulfilled Promise

Over the last forty years, there have been constitutional challenges to state education financing systems in 45 out of 50 states in the US.[6] The impetus for this litigation has largely been the discrepancies in educational opportunities available to disadvantaged, mostly black and ethnic minority children in comparison to their wealthier, mostly white counterparts. In this sense, the roots of US education financing litigation can be traced back to the promise of equal educational opportunity represented by the jurisprudential landmark of *Brown*. The proliferation of education financing litigation over the last fifty years is part of the contested legacy of *Brown*, and is in some sense also the continuation

[5] *New Yorkers for Students' Educational Rights v State of New York* 29 NY3d 501 (NY 2017) (*NYSER*).

[6] For a summary of school funding court cases from 1973 to 2017, see 'Overview of Litigation History' (SchoolFunding.Info: A Project of the Centre for Educational Equity at Teachers College, Columbia University) <http://schoolfunding.info/litigation-map/> accessed 26 November 2018.

of *Brown* by other means.[7] At the same time, the seeds of the discourse about school finance equity predate the 1954 Supreme Court decision, as strong resonances are found in the evolution of the litigation strategy pursued by the National Association for the Advancement of Coloured People (NAACP) during the two decades leading up to their victory in *Brown*. Working within the constraints of the 'separate but equal' doctrine approved by the Supreme Court in *Plessy v Ferguson*,[8] the NAACP initially sought to achieve equal educational opportunity by securing equal resources for racially separated schools.[9] Martha Minow observes that the NAACP's subsequent shift to pursuing racial integration was a strategic move premised 'at least in part on the theory that "green follows white". The dollars spent on white students would have to benefit black students if the students sat side by side in the same school.'[10] Although by 1950 the struggle for equal educational opportunity was explicitly aimed at assuring integration in schools,[11] the NAACP's early focus on equity in school expenditure underscores the historical and ideological continuity between past and present efforts to achieve the elusive promise of *Brown*.

This strategy of squarely confronting the constitutionality of segregated schooling yielded success as the Supreme Court declared in *Brown I* that the 'separate but equal' doctrine violated the Fourteenth Amendment's requirement of equal protection of the

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[7] David Hinojosa and Karolina Walters, 'How Adequacy Litigation Fails to Fulfill the Promise of Brown (But How It Can Get Us Closer)' (2014) 2014 Michigan State Law Review 575, 582; Scott Bauries, 'State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation' (2011) 18 George Mason Law Review 301, 326; Michael A Rebell, 'Education Adequacy, Democracy, and the Courts' in Timothy Ready, Christopher Edley and Catherine E Snow (eds), *Achieving High Educational Standards for All* (NAP 2002); Matthew H Bosworth, *Courts as Catalysts: State Supreme Courts and Public School Finance Equity* (SUNY 2001).

[8] *Plessy v Ferguson* 613 US 537 (1896).

[9] Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark* (OUP 2010) 9.

[10] ibid 9–10.

[11] ibid 17.

law. Concerned about the remedial implications of its finding that separate educational facilities were inherently unequal,[12] the Supreme Court in *Brown II* deferred to the defendant schools to formulate their own desegregation plans and delegated remedial oversight of this process to the local district courts. Although the defendant schools were urged to make a 'prompt and reasonable start' towards compliance and implement desegregation plans 'with all deliberate speed',[13] the Supreme Court effectively opted for gradual desegregation as a remedial compromise in the face of white resistance.[14] Rather than alleviating such resistance, however, the leeway afforded to local school boards gave them a foothold for defying the desegregation mandate through insidious avoidance and delay tactics. Thus it was that *Brown II* spawned decades of litigation concerning the implementation of desegregation, frustrating efforts to fulfil the promise of equal educational opportunity.

The remedial challenges posed by the desegregation mandate nevertheless served as a catalyst for significant legal innovation as courts used their equitable powers to find creative remedies for overcoming resistance to desegregation. Taking up the Supreme Court's invitation to be 'guided by equitable principles'[15] in fashioning desegregation decrees, the lower courts extended their limited remedial arsenal by developing what would become the standard remedial tool for institutional reform—the structural interdict.[16] It was through an extended remedial process in which the local district courts retained supervisory jurisdiction that the right protected in *Brown* acquired more concrete

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[12] ibid 20.

[13] *Brown II* (n 3) 300–301.

[14] Minow (n 9) 20.

[15] *Brown II* (n 3) 300.

[16] Shep Melnick, 'Taking Remedies Seriously: Can Courts Control Public Schools?' in Joshua M Dunn and Martin R West (eds), *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* (BIP 2009) 24.

meaning and clearer contours. Pointing to *Brown* as the paradigm example of remedial equilibration, Levinson observes that '[t]he "true" principle of *Brown* only later began to come into focus, gradually and retrospectively, through the lens of remedy'.[17] This development was incremental but not linear, as there was a waxing and waning in the courts' willingness to ensure desegregation was implemented. Earlier cases such as *Swann v Charlotte-Mecklenburg Board of Education*[18] represent a firm rejection of neutral-sounding policies aimed at bypassing desegregation. The Supreme Court's declaration in *Swann* that busing is an appropriate remedy for addressing the racial imbalance in schools suggests a more positive emphasis on promoting *de facto* integration rather than simply enforcing *de jure* desegregation plans. Central to this decision was Burger CJ's reliance on the 'breadth and flexibility [that] are inherent in equitable remedies',[19] with his extended discussion on the Court's equitable remedial power[20] cited heavily in argument during *CFE III*.

In the context of a public backlash against forced busing as approved in *Swann*, the trend of cases in the 1980s tracks a withdrawal by the federal courts from a more active remedial role in supervising desegregation.[21] This retreat reflects the courts' reluctance to recognise the positive duties required to realise *Brown*'s promise of equal educational opportunity, with Fletcher commenting in this regard that '[t]he history of the Court's

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[17] Daryl J Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 Columbia Law Review 857, 875.

[18] *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971) (*Swann*).

[19] ibid 15.

[20] Shep Melnick disparages Burger CJ's decision for reading 'more like a speech by Polonius than a concise legal exegesis'. Melnick (n 16) 26. This is overstated, for there is much valuable discussion on equitable remedies in the decision. The vagueness that Melnick identifies may partly stem from the fact that Burger CJ's judgment was revised six times to accommodate differences of opinion among the justices, but when taken out of context, statements like the following admittedly leave much to be desired: '[I]n seeking to define the scope of remedial power or limits on remedial power of courts in an area as sensitive as we deal with here, words are poor instruments to convey the sense of basic fairness inherent in equity.' *Swann* (n 18) 31.

[21] Michael A Rebell, 'Ensuring Adequate Funding: The Role of the Courts' in William J Mathis and Tina M Trujillo (eds), *Learning from the Federal Market-Based Reforms* (Information Age 2016) 513.

decisions since *Brown* is largely the history of the growing doctrinal recognition [of the distinction between desegregation and integration], and of the Court's growing discomfort over its significance for the role of the federal judiciary'.[22] The Supreme Court's rejection of voluntary integration plans in *Parents Involved in Community Schools v Seattle School District No.1* represents the culmination of this retreat from *Brown*'s positive vision of racial integration, no better illustrated than by the facile conclusion with which Roberts CJ ends his opinion for the plurality: 'The way to stop discrimination on the basis of race is to stop discriminating on the basis of race'.[23]

Although the courts ultimately 'lost their nerve'[24] in this battle for racial integration, Martha Minow highlights how *Brown* has nevertheless become a touchstone for struggles around the globe, inspiring an expanded vision of equal opportunity across other dimensions of diversity.[25] Both supporters and detractors of the court's role in institutional reform attribute *Brown II* as having triggered a 'rights revolution'[26] and the new model of public law litigation most famously articulated by Abram Chayes.[27] Through their expanded exercise of remedial power, the courts 'fashioned a new jurisprudence of structural reform'[28] which extended well beyond the implementation of desegregation. In the sixty years since *Brown II*, the courts have engaged in the

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[22] William A Fletcher, 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1981) 91 Yale Law Journal 635, 674.

[23] *Parents Involved in Community Schools v Seattle School District No 1* 551 US 701 (2007) 748 (Roberts CJ) (*Parents Involved*).

[24] Minow (n 9) 26.

[25] ibid 32.

[26] Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (UCP 1998).

[27] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1975) 89 Harvard Law Review 1281.

[28] Colin S Diver, 'The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions' (1979) 65 Virginia Law Review 43, 44.

restructuring of schools and institutions in a range of other public settings, such as prisons, police, housing and mental health. There is perhaps no better illustration of the 'protean persistence of public law litigation'[29] than the many lines of education financing litigation that seek to make good on the old promise of *Brown.* In the midst of disappointments like *Parents Involved*, the litigation on education financing 'has kept alive the quest for equity in the spirit of *Brown* at a time when the integration of schools has fallen off the nation's radar screen'.[30]

B. Three Waves of Education Financing Litigation

Education financing litigation addresses one of the systemic causes of continuing inequality of educational opportunity in the United States: the funding formulas and rules that determine how state revenues are allocated to public schools. Education is often the largest budgetary commitment in state spending, but school financing systems do not ensure these benefits are equally felt. States generally delegate their responsibility for the provision of primary education to local school districts, and this local control over education plays a key role in allowing disadvantage to be perpetuated because of the way that revenue is collected and allocated.[31] Revenue for education is derived in almost equal shares from state sources and local sources.[32] While the state designs complex formulas

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[29] Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015, 1021.

[30] Rebell, 'Ensuring Adequate Funding: The Role of the Courts' (n 21) 516.

[31] Melissa C Carr and Susan H Fuhrman, 'The Politics of School Finance in the 1990s' in Helen F Ladd, Rosemary Chalk and Janet S Hansen (eds), *Equity and Adequacy in Education Finance: Issues and Perspectives* (NAP 1999) 38.

[32] Robert Berne and Leanna Stiefel, 'Concepts of School Finance Equity: 1970 to the Present' in Helen F Ladd, Rosemary Chalk and Janet S Hansen (eds), *Equity and Adequacy in Education Finance: Issues and Perspectives* (NAP 1999) 9.

for the distribution of state funds across school districts, those local districts retain autonomy to decide their per student expenditure because they control the local budgetary contribution to education.[33] The lion's share of this local contribution comes from local property taxes which are in turn based on property values, meaning that per pupil spending in public schools reflects the wealth of a district's property base.[34] Even where state aid is given to supplement the low revenues from poorer districts, vast discrepancies remain as property-rich districts are free to spend as much as they can afford.[35] Rather than education being an equaliser, school financing systems entrench inequalities: children from poorer districts (with lower property values) will attend local schools that have less money to meet their educational needs.

Spurred by these discrepancies in the distribution of school resources and encouraged by judicial involvement in desegregation, those looking to reform education financing turned to the courts in the late 1960s. These early efforts were focused on showing that the existing education financing system denied children equal protection of the law as required by the Fourteenth Amendment.[36] The move to establish a fundamental right to education under the US Constitution led to what is commonly

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[33] ibid. This may include a general formula for all students as well as special formulas to address particular types of students, specific expenditures, district-specific issues and additional funding for poorer districts.

[34] ibid 8.

[35] 'Unfulfilled Promises: School Finance Remedies and State Courts' (1991) 104 Harvard Law Review 1072, 1074.

[36] For some of the formative contributions to the development of a legal strategy during the late 1960s, see Arthur E Wise, *Rich Schools Poor Schools: The Promise of Equal Educational Opportunity* (UCP 1968); Harold Horowitz, 'Unseparate but Unequal: The Emerging Fourteenth Amendment Issue in Public School Education' (1966) 13 UCLA Law Review 1147; JE Coons, WH Clune and SD Sugarman, 'Educational Opportunity: A Workable Constitutional Test for State Financial Structures' (1969) 57 California Law Review 305. For an excellent overview of the various conceptions of equity developed in these accounts, see Paul A Minorini and Stephen D Sugarman, 'School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future' in Helen F Ladd, Rosemary Chalk and Janet S Hansen (eds), *Equity and Adequacy in Education Finance: Issues and Perspectives* (NAP 1999) 35–41.

referred to as the first of three 'waves'[37] of school finance litigation which—to use Martha Minow's metaphor—followed 'in *Brown*'s wake'.[38] The early prospects for success under the US Constitution were quickly scuppered by the seminal federal school finance case of *San Antonio Independent School District v. Rodriguez*.[39] In this 5-4 decision, the Supreme Court refused to recognise education as a 'fundamental interest' on the basis that it did not feature as either an explicit or implicit guarantee in the US Constitution. Without the strict scrutiny test to apply to a fundamental interest, Powell J found that local control over education provided a 'rational basis' for the Texas education financing system, and therefore upheld its constitutionality in spite of conceding the glaring inequalities which it perpetuated. He also rejected the plaintiffs' claim that wealth should be treated as a 'suspect classification' because there was no necessary correlation between district and wealth. This drew a strong dissent from Marshall J concerning the implications of the majority decision for *Brown*'s promise of equal educational opportunity:[40] 'The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in school districts within which they reside'.[41] The final footnote in his dissent is a thinly veiled invitation to challenge educational financing systems under

[37] See the classification of three waves in Michael Heise, 'State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy' (1995) 68 Temple Law Review 1151; William E Thro, 'The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Reform Litigation' (1990) 19 Journal of Law and Education 219.

[38] Minow (n 9).

[39] *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) (*Rodriguez*).

[40] Twenty years earlier, Thurgood Marshall had been acting as lead counsel for the NAACP in *Brown I*.

[41] *Rodriguez* (n 39) 70 (Marshall J).

state constitutions[42] and, indeed, with *Rodriguez* appearing to foreclose further pursuit of federal education financing claims,[43] plaintiffs turned their attention to state courts.

The 'second wave' of education financing litigation brought a shift from federal equity claims to state equity claims. In contrast to the US Constitution, all fifty state constitutions contain clauses addressing the state's duty to provide education which can be used in combination with equal protection clauses to ground an equity challenge. Two early victories in California[44] and New Jersey[45] followed close on the heels of *Rodriguez*, marking what would become a decade of intense activity in equity litigation that capitalised on an alignment of political incentives and interest in school finance reform.[46] The *Serrano* case, which asserted both federal and state equity claims, was a particularly significant breakthrough as the Californian Supreme Court revisited and reaffirmed its earlier finding[47] that education is a fundamental right under the Californian Constitution in spite of *Rodriguez* having been handed down in the intervening period. At the same time, however, *Serrano* also illustrates the remedial shortcomings of equity claims for school finance reform. Constrained by a cap on property taxes imposed by voters in wealthy school districts, the state legislature was forced to level down education financing to reduce the resource discrepancies and thereby satisfy the court's mandate.[48]

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[42] Marshall J pointedly observes that 'nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions.' ibid 133 fn 100 (Marshall J).

[43] *Rodriguez* has long been subject to criticism, and some recent scholarship revisits potential federal avenues for challenging school financing systems. See Charles J Ogletree, Jr. and Kimberly Jenkins Robinson (eds), *The Enduring Legacy of* Rodriguez*: Creating New Pathways to Equal Educational Opportunity* (HEP 2015); Goodwin Liu, 'Education, Equality, and National Citizenship' (2006) 116 Yale Law Journal 330.

[44] *Serrano v Priest* 557 P2d 929 (CA 1976).

[45] *Robinson v Cahill* 303 A2d 273 (NJ 1973).

[46] Carr and Fuhrman (n 31) 142–143.

[47] *Serrano v Priest* 487 P2d 1241 (CA 1971).

[48] Minorini and Sugarman (n 36) 49.

Impact studies on *Serrano* suggest these equalizing reforms have led to a significant decrease in education spending in California.[49] With the risk of counter-productive reforms and other implementation difficulties increasingly evident, the tide turned for equity litigation during the 1980s as courts retreated into a more deferent stance towards the legislative process.[50]

Litigators responded with a change in legal strategy by starting to frame claims in terms of the basic level of educational opportunity guaranteed by the education clauses in state constitutions. While there is textual variation in the formulation of state education clauses, a certain level or quality of educational opportunity is implicit in the use of language like 'adequate',[51] thorough and efficient',[52] high quality'[53] and 'sound'.[54] This strategy yielded a spate of successful cases in Kentucky,[55] Texas,[56] Montana[57] and New Jersey,[58] making 1989 a watershed moment that ushered in the 'third wave' of education financing litigation: the adequacy movement. *Rose v Council for Better Education* was a particularly ground-breaking case, not only because of its far-reaching finding that the

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[49] William N Evans, Sheila E Murray and Robert M Schwab, 'The Impact of Court-Mandated School Finance Reform' in Helen F Ladd, Rosemary Chalk and Janet S Hansen (eds), *Equity and Adequacy in Education Finance: Issues and Perspectives* (NAP 1999) 74–75. The Californian experience does not, however, prove that equity will necessarily lead to a levelling down in state expenditure: see Minorini and Sugarman (n 36) 49.

[50] Hinojosa and Walters (n 7) 599–600.

[51] Georgia Constitution, art VIII s 1, sub-s 1.

[52] New Jersey Constitution, art VIII s 4, sub-s 1.

[53] Florida Constitution, art IX s 1.

[54] New York State Constitution, art XI, s 1, as interpreted in *Board of Education, Levittown Union Free School District v Nyquist* 57 NY2d 27 (NY 1982) (*Levittown*).

[55] *Rose v Council for Better Education* 790 SW2d 186 (KY 1989).

[56] *Edgewood v Kirby* 777 SW2d 391 (TX 1989).

[57] *Helena Elementary School District No 1 v State of Montana* 784 P2d 412 (MT 1989).

[58] *Abbott v Burke* 119 A2d 287 (NJ 1990) (*Abbott*).

Kentucky common school system was unconstitutional in its entirety, but because it was the first to advance a conception of education as an individual right giving rise to positive duties: 'A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right.'[59] While this shift in legal thinking 'opened the doctrinal door to adequacy as a theory of relief',[60] it was given the necessary political momentum by the standards-based reform movement launched by President Bush and all 50 governors at the 1989 National Education Summit.[61] The subsequent adoption of explicit standards for educational achievement gave clear definitional content to the concept of 'adequacy' and held promise as a judicially manageable standard for enforcing the state's positive duties in education.[62]

The shift in focus from negative to positive duties that tracks the shift from equity to adequacy has intensified controversy about the court's remedial role in education financing litigation. On the one hand, the remedial implications of adequacy claims are more politically palatable because they seek to level up all educational resources rather than diverting existing funding from wealthy school districts in a way that levels down their quality of education.[63] On the other hand, adequacy remedies often take the form of detailed, prescriptive orders that draw courts into polycentric decision-making on education financing reform and strain the institutional dynamic between the branches of government.[64] While adequacy claims have proved more successful on the merits,[65] critics

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[59] *Rose v Council for Better Education* (n 55) 212 (Stephens CJ).

[60] Scott Bauries, 'Foreword: Rights, Remedies and Rose' (2010) 98 Kentucky Law Journal 703, 709.

[61] Rebell, 'Ensuring Adequate Funding: The Role of the Courts' (n 21) 513.

[62] ibid 514.

[63] ibid 515.

[64] John Dinan, 'School Finance Litigation: The Third Wave Recedes' in Joshua M Dunn and Martin R West (eds), *From Schoolhouse to Courthouse: The Judiciary's Role in American Education* (BIP 2009) 102.

point to protracted cases like the CFE litigation as proof that courts are ineffective in remedying inadequacies in school finance systems.[66] Much of this follow-up litigation stems from disagreements about judicially manageable standards of adequacy and the extent to which a state's education financing system complies with them. In making explicit the link between school funding and educational performance, court-ordered adequacy reforms have attracted intense empirical and methodological scrutiny among experts in education finance. The increased use of 'costing-out' studies as featured in the CFE litigation is a particular bone of contention in this regard.[67] In many ways, the implementation difficulties that have plagued adequacy litigation epitomise the key remedial challenge associated with the enforcement of positive duties—the question of how to close the gap between an inadequate reality and a constitutional ideal.

The progression of the CFE litigation has risen and fallen in sync with the changing fortunes of the adequacy movement more generally. *CFE II* represented a high-water mark for adequacy litigation at a time when courts embraced a more active role in the remedial process. Similarly, the judicial pullback in *CFE III* coincided with several disappointing rulings handed down between 2005 and 2008 where courts terminated their supervisory jurisdiction over long-running cases, a trend characterised by some as evidence that the third wave of education financing litigation is receding.[68] Indeed, the rate of success for new adequacy claims has declined since the 2008 economic recession, suggesting that courts are reluctant to give more expansive content to rights when the

[65] Michael A Rebell, 'Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint' (2012) 75 Albany Law Review 1855, 1864–1865; Dinan (n 64) 98.

[66] Hinojosa and Walters (n 7) 614–615.

[67] For an example of contrasting views, see Michael A Rebell, 'Adequacy Cost Studies: Perspectives on the State of the Art' (2006) 1 Education Finance and Policy 465; Eric Alan Hanushek, 'Science Violated: Spending Projections and the "Costing-Out" of an Adequate Education' in Eric Alan Hanushek (ed), *Courting Failure: How School Finance Lawsuits Exploit Judges Good Intentions and Harm Our Children* (HIP 2006).

[68] Dinan (n 64) 106–112.

remedial implications would be more costly.[69] A different trend is observed, however, with recent challenges to budget reductions that do not comply with pre-crisis adequacy rulings, as these cases have fared remarkably well in spite of the prevailing political aversion to tax raises.[70] These post-recession compliance cases bode well for the recently filed claim by the New Yorkers for Students' Educational Rights (NYSER) which challenges New York state's compliance with the standard of a 'sound basic education' developed in the CFE litigation.[71]

C. The State Constitutional (Con)text and Positive Duties

The relative success of the adequacy movement in education financing litigation is due in no small part to the amenability of the state constitutional context to the judicial enforcement of positive duties. Unlike the 'textual wasteland'[72] of the US Constitution, many state constitutions contain explicit guarantees in relation to education, welfare, shelter and nutrition that were envisaged as giving rise to judicially enforceable positive duties.[73] For example, the New York Constitution charges the state legislature with the 'aid, care, and support of the needy',[74] about which the provision's sponsors at the time

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[69] Michael A Rebell, '2017 Supplement' in Michael A Rebell, *Courts and Kids: Pursuing Educational Equity Through the State Courts* (UCP 2017) 9.

[70] ibid 10–12.

[71] Third Amended Complaint, *New Yorkers for Students' Educational Rights v State of New York* Index No 100274/2013. This amended complaint and documents relating to the *NYSER* litigation are available at <www.nyser.org/litigation-papers/> accessed 28 November 2018.

[72] Burt Neuborne, 'State Constitutions and the Evolution of Positive Rights' (1989) 20 Rutgers Law Journal 881, 893.

[73] See, for example, Jonathan Feldman, 'Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government' (1993) 24 Rutgers Law Journal 1057, 1076; Emily Zackin, 'Positive Constitutional Rights in the United States' (PhD thesis, Princeton University 2010). For a dissenting opinion, see Dinan (n 64) 99.

[74] New York Constitution, art XVII s 1.

declared: 'Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread'.[75] In contrast to the US Constitution, state constitutions are 'enabling documents, designed to authorise, not restrain, the government' and state courts accordingly have a far stronger constitutional mandate than federal courts to enforce positive duties.[76] This mandate is especially important in 'areas of core state responsibility',[77] such as education financing, that the US Supreme Court has placed outside of federal protection:

> [T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the [Supreme] Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.[78]

If states are 'laboratories of experimentation'[79] within the American federalist system, state courts have a creative role to play in finding novel, responsive ways to ensure state constitutional commitments are met. Being 'imbued with the power and creative ethos of the common law tradition', state courts should recognise this exercise of equitable remedial authority to enforce positive constitutional duties as simply 'the placing of old wine in new bottles'.[80]

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75 New York State Constitutional Convention of 1938, Revised Record 2126 cited in Feldman (n 73) 1076–1077.

76 Neuborne (n 72) 898.

77 *Horne v Flores* 129 US 2579 (2009) 2593 (Alito J).

78 William J Brennan Jr., 'State Constitutions and the Protection of Individual Rights' (1977) 90 Harvard Law Review 489, 503.

79 The metaphor of states as laboratories of experimentation has developed from Brandeis J's description of state courts as laboratories which can 'try novel social and economic experiments'. *New State Ice Co v Liebmann* 285 US 262 (1932) 311 (Brandeis J).

80 Neuborne (n 72) 897.

II. Remedial Fault-Lines Foreshadowed: *CFE I*

A. The Inequalities Prompting the Campaign for Fiscal Equity

The plaintiffs in the CFE litigation comprised a cross-section of stakeholders. The action was spearheaded by Campaign for Fiscal Equity, Inc., a not-for-profit corporation whose membership consists of community school boards, individual citizens, and a number of parent advocacy organisations. They were joined by 14 of New York City's 32 school board districts and parents (suing on their own behalf and on behalf of their children) of students who attended New York City public schools in a cross-section of local school districts. The context for their complaint was the under-funding of inner city schools which gave rise to noticeable discrepancies in educational opportunities and quality between schools with mostly disadvantaged and ethnic minority students, and those schools in more privileged districts that drew from a wealthier, largely white student base.

At the time of trial, the public education system in New York City consisted of nearly 1,200 schools serving 1.1 million children and supported by over 135,000 staff including its 78,000 teachers.[81] 84 per cent of these 1.1 million schoolchildren were from racial minorities and 80 per cent were born outside the US.[82] The majority of these students had greater educational needs than other students in the State: New York City's schoolchildren represented approximately 70 per cent of the state's students with concentrated poverty, over 60 per cent of the state's students participating in remedial programs, approximately 50 per cent of the state's students with severe disabilities, and

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[81] *CFE IIc* (n 1) 903.

[82] ibid 903–904.

81 per cent of those children in the state classified as Limited English Proficient.[83] Yet the school financing system aggravated these inequalities by allocating less state aid per student in New York City than the state-wide average. As is the case in most other states in the US, revenue for education is generated by a combination of local, state and federal sources. Leading up to the *CFE* trial, the bulk of school funding in New York came from local sources (56 per cent) and a significant portion from the State (40 per cent) with the remaining 4 per cent provided by the federal government.[84] Total per-pupil expenditures in New York City's public schools were lower than in three quarters of the State's districts, and both the City and the State's dollar contributions were lower than the average contributions in other districts.[85] Having met with no success in advocating for budgetary reforms through the political process, the plaintiffs resorted to litigation to challenge the constitutionality of State's education financing scheme. The defendants were the State of New York, the Governor, the Commissioner of Education, the Commissioner of Taxation and Finance, and the Majority and Minority Leaders of the Senate and the Assembly.

The plaintiffs initially put forward four claims, but only two were upheld by the Court of Appeals in *CFE Ic* as grounding valid causes of action. The first was an education adequacy claim alleging that the State's education financing scheme breached the right to education entrenched in the New York State Constitution. Art XI s 1 (the Education Article) of the State Constitution requires that '[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the

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83 Amended Complaint for Declaratory and Injunctive Relief, *Campaign for Fiscal Equity v State of New York* Index No 93111070/1993 (June 1993) 14 <https://www.escr-net.org/sites/default/files/caselaw/cfe_equity_amended_complaint_0_0.pdf> accessed 28 April 2018.

84 *CFE IIc* (n 1) 905.

85 ibid.

children of this state may be educated', but the plaintiffs alleged that the State was failing in their positive duty to provide New York City public school students with the opportunity to obtain a 'sound basic education'.[86] The second claim was an educational equality claim challenging the State's formula for allocating funds to public schools. They argued that it had a disparate impact on racial and ethnic minorities and thus violated the Department of Education's implementing regulations for Title VI of the Civil Rights Act of 1964.[87]

Although the trial court found a Title VI breach in *CFE IIa*, success was a short-lived as DeGrasse J's decision was quickly overturned by the Appellate Division. The Court of Appeals sounded the death knell for the plaintiffs' equality claim in *CFE IIc* by confirming the Appellate Division's finding that there is no private right of action under Title VI.[88] The equality claim therefore failed at the outset, in spite of the clear evidence that the State's school funding formula resulted in an inequitable distribution of educational resources that had a disproportionately harmful effect on minority students relative to their white counterparts. Denise Morgan, who represented the Black, Puerto Rican and Hispanic Legislative Caucus as *amicus curiae* in the litigation, has made a strong argument for why the failure of the plaintiffs' Title VI claim was both strategically and theoretically significant.[89] Most obviously, the rejection of the Title VI claim signalled the demise of one of the more promising federal litigation strategies for ensuring access to

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[86] This interpretation of the Education Article as providing for a 'sound basic education' was established in *Levittown* (n 54).

[87] 42 USC s 2000d (1964).

[88] *CFE IIc* (n 1) 903. Importantly, the Appellate Division and the Court of Appeals did not dismiss the Title VI claim because of any hurdle concerning private rights of action under state law. Rather, the dismissal was based on the fact that, while the matter was pending before the Appellate Division, the Supreme Court handed down *Alexander v Sandoval* 532 US 275 (2001) which held that, as a matter of federal law, there was no private right of action under Title VI.

[89] Denise Morgan, 'Campaign for Fiscal Equity, Inc. v. New York: No Slam Dunk Victory for Public School Children' (2003) 31 Fordham Urban Law Journal 1291.

quality education for all children in the US, but especially for minorities and disadvantaged groups. As Morgan highlights, Title VI claims have been relied on to challenge a myriad of educational issues affecting children of colour, including the placement of Black children in remedial classes, the failure of school districts to provide appropriate programmes for children whose first language is not English, and, of course, the disparate impact of public school funding schemes.[90] The more serious consequence of the courts' rejection of the Title VI claim, however, is the particular harm of not recognising the race-based injury which the financing system caused. As Morgan points out, only the plaintiffs' federal claim 'takes into account the particular injuries caused by the unjustified misdistribution of government resources by race, the harm to communities of colour, and the harm to our democratic society'.[91]

B. Grappling with the Remedial Implications of Positive Duties

Without wanting to overlook the implications of the failed equity claim, this case study is restricted to the claim based on education adequacy as its success meant the courts were forced to grapple with the remedial challenges of enforcing the state's positive duties under the Education Article.[92] The splits on the Court of Appeals in *CFE IIc* and *CFE IIIc* reflect a fundamental disagreement about how courts should exercise their discretionary remedial power when enforcing the State's positive duties in education. The

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[90] ibid 1300.

[91] ibid 1301.

[92] Of course, the adequacy claim was an indirect way of tackling the inequality of educational provision in New York City public schools. See Helen Taylor, 'Conceptualizing and Enforcing the Right to Quality Education for Minorities and Disadvantaged Groups: Reflections on the Campaign for Fiscal Equity Litigation' in Sandra Fredman, Meghan Campbell and Helen Taylor (eds), *Human Rights and Equality in Education: Comparative Perspectives on the Right to Education for Minorities and Disadvantaged Groups* (Policy Press 2018).

fault-lines of this disagreement are already evident in *CFE Ic*, where the Court had to decide whether there is a constitutional floor with respect to education adequacy. In particular, the Court was required to establish the nature of the State's positive duty under the Education Article and the content of a 'sound basic education'. The sharp divide between the Opinion of the Court and the dissent turned on the remedial implications of the competing interpretations of the State's positive duty. *CFE Ic* therefore foreshadows the remedial challenges that would later emerge in *CFE IIc* and *CFE IIc*.

Delivering the Opinion of the Court in *CFE Ic*, Ciparick J began by recapping the Court of Appeal's interpretation of the Education Article in *Levittown*.[93] Based on its examination of the language and history of the Education Article, the Court of Appeals held in *Levittown* that the constitutional drafters envisaged 'a State-wide system assuring minimal acceptable facilities and services in contrast to the unsystematized delivery of instruction then in existence within the State'.[94] The interpretation of 'education' as connoting 'a sound basic education'[95] was characterised by Ciparick J as *Levittown*'s 'unambiguous acknowledgment of a constitutional floor with respect to educational adequacy'.[96] She confirmed that this imposed a positive duty on the Legislature 'to ensure the availability of a sound basic education to all children of the State' and did not shy away from the implications of this for the court's role with his strong assertion that 'we are responsible for adjudicating the nature of that duty'.[97]

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93 *Levittown* (n 54).

94 ibid 47.

95 ibid 48.

96 *CFE Ic* (n 2) 315.

97 ibid.

Given the procedural nature of the Court's task in *CFE Ic* to decide whether a cause of action had been properly stated under the Education Article, Ciparick J considered it premature to engage in an exhaustive discussion of the meaning of a 'sound basic education'. However, she did provide the trial court with some guidance as to what this 'constitutional concept and mandate entails'.[98] First, she provided a working definition of a 'sound basic education' as consisting of 'the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury'.[99] Second, she articulated a rudimentary template to guide the trial court's determination of whether the State had met its constitutional obligation by listing the 'essentials' that should be evaluated for their adequacy:

> Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils and reasonable current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.[100]

Under this template, the key factual question to be ascertained by the trial court was whether there is a causal link between the State's educational funding scheme and any proven failure to provide a sound basic education measured according to these essential elements.

Both Levine J's concurring opinion and Simons J's dissent express discomfort about the remedial implications of the majority's definition of a 'sound basic education' and the positive duty it imposes on the State. Levine J agreed with the majority that the plaintiffs put forward a legally sufficient cause of action under the Education Article, but

[98] ibid 317.

[99] ibid 316.

[100] ibid 317.

he argued that the concept of a 'sound basic education' advanced in *Levittown* is far more circumscribed than the list of 'essentials' delineated by Ciparick J. Pointing to the 'enormous practical and political complexity' of educational objectives and financing,[101] Levine J warned against courts being drawn into making qualitative and quantitative assessments about educational adequacy which are more appropriately 'determined in other forums than by judicial fiat in interpreting the State Constitution'.[102] He therefore lowered the constitutional floor of education adequacy to encompass only those 'minimal categories of instruction' in respect of basic literacy, computational skills and citizenship awareness without which a system could not be said to constitute an 'education'.[103] His repeated reference to the inherent limitations of courts in enforcing the constitutional obligations under the Education Article grounds this more restrictive interpretation.[104] Foreshadowing the remedial challenges that follow in *CFE II* and *CFE III*, Levine J ends his judgment with a prediction that '[t]he majority's significantly less precise or exacting standard for the sound basic education constitutionally required to be provided invites and inevitably will entail the subjective, unverifiable educational policy making by Judges, unreviewable on any principled basis'.[105]

While Levine J constricted the scope of the right to mitigate the remedial challenges of enforcing the state's corresponding positive duty, Simons J's dissent reveals a discomfort with the judicial enforcement of positive duties even in respect of a very 'thin' concept of educational adequacy. He criticised the majority's insistence that the

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[101] *Levittown* (n 54) 38.

[102] *CFE Ic* (n 2) 332.

[103] ibid 331.

[104] ibid 325, 330.

[105] ibid 332.

Education Article embodies an entitlement to an adequate education and instead argued that the State is simply required to put in place a system that provides some kind of state-wide financial support.[106] Further than this, he asserted, the courts 'have no authority, except in the most egregious circumstances, to tell them that they have not done enough.'[107] His rejection of any qualitative component to a 'sound basic education' was premised on his characterisation of the state's duty as being general or systemic rather than a positive duty correlative to an individual right personal to each child in New York, as Ciparick J had conceptualised it.[108] By casting the state's duty as general rather than individual, Simons J concluded that the Court could only 'interfere' if the executive and legislature altogether failed to establish and fund a state-wide education *system*, thus avoiding the need for a 'judicial determination of the highly subjective and policy-laden questions of how much (or little) students must be taught or how well (or poorly) they must perform before a court should intervene.'[109]

III. Ascertaining Systemic Relief: *CFE II*

The above discussion of *CFE Ic* demonstrates how remedial concerns overshadowed even the threshold procedural question of whether the plaintiffs had a valid cause of action under the Education Article. The splits on the Court of Appeal reflect varying degrees of discomfort about the remedial consequences of tying the state's positive duties under the Education Article to a constitutional standard of educational adequacy.

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[106] ibid 334.

[107] *CFE Ic* (n 2) 342.

[108] ibid.

[109] ibid 341.

This disagreement over the scope of the state's positive duty became more pronounced in *CFE II*, as the trial court was tasked with fleshing out the template provided by the Court of Appeals in order to establish whether the actual quality of educational opportunity in New York City fell short of the constitutional standard of a 'sound basic education' and, if found to be inadequate, whether such inadequacy was causally linked to the State's education funding system.

A. CFE IIa

After a seven-month trial in the Supreme Court involving the testimony of 72 witnesses and 4,300 exhibits, DeGrasse J delivered a thorough and well-reasoned decision on these questions. The judgment opens with an excerpt from *Brown I* before situating the *CFE* case within the history of school funding litigation, illustrating a sensitivity to context that is sustained throughout his analysis of the evidence presented during trial. DeGrasse J carefully followed the directions given in *CFE Ic* for developing the constitutional standard of education adequacy and assessing the State's compliance with it. Elaborating on the template provided by the Court of Appeals, he concluded that 'a sound basic education consists of the foundational skills that students need to become productive citizens capable of civic engagement and sustaining competitive employment'.[110] Applying the list of essential inputs identified in *CFE Ic* as indicators for assessing educational opportunity, DeGrasse J found that most New York City schools were failing to meet the constitutional standard of adequacy. This systemic failure was confirmed by his review of the educational outputs of these schools as represented by test results and graduation rates. Finally, DeGrasse J found a causal link between these

[110] *Campaign for Fiscal Equity v State of New York* 719 NYS2d 475 (NY Sup Ct 2001) 17–18.

inadequate educational opportunities and the school financing system, with the result that the State was held to have 'over the course of many years consistently violated the Education Article of the NY Constitution by failing to provide the opportunity for a sound basic education to New York City public school students'.[111]

DeGrasse J then turned his attention to the remedial order. The remedy took the form of a structural interdict directing the State to ascertain the cost of a 'sound basic education' in districts across the State and to reform the education financing system accordingly.[112] While deferring to the State to devise these reforms, clear parameters were set for guiding the legislature in this task. These included both a list of the essential educational resources that had to be provided to meet the constitutional standard of a 'sound basic education'[113] and a list of the shortcomings of the current financing system that had to be addressed.[114] Finally, the court fixed a date for the parties to report on the progress made after five months, and set a final deadline a further three months later by which the reforms had to be implemented.[115] DeGrasse J declared that the court would retain supervisory jurisdiction over the matter for as long as was necessary to ensure the State remedied its breach of the Education Article.[116]

DeGrasse J's remedial decision-making reflects a careful prioritisation and optimisation of the Remedial Principles set out in Chapter Four. He prioritises Institutional Complementarity and Systemic Compliance by giving the legislature the first opportunity to devise state-wide reforms rather than prescribing a detailed remedy for

[111] ibid 113.

[112] ibid 115.

[113] ibid 114–115.

[114] ibid 115.

[115] ibid 116.

[116] ibid.

increasing the level of funding allocated to New York City public schools.[117] The three reasons he gives for this remedial decision justifies this prioritisation as sound in the context of the paradigmatically polycentric issue of education financing reform. First, DeGrasse J argued that deference is owed on the basis of the legislature being named as the primary duty-bearer under the Education Article.[118] This implies that the legislature should be given the first opportunity to remedy the breach of their positive duty. Second, the systemic nature of the required reforms justified expanding the scope of relief beyond New York City public schools (which had been the focus of the CFE action), to the funding of public schools across the entire State.[119] By optimising Systemic Compliance through state-wide reform, DeGrasse J recognised the increased importance of deference in view of the legislature being 'in a better position [than the court] to gauge the effects of reform on the State as a whole'.[120] This demonstrates his sensitivity to the fact that systemic reform involving the allocation of scarce resources, such as education financing schemes, inevitably has consequences for a range of causally related issues which courts might not be best-placed to grasp fully. The third reason was similarly mindful of comparative institutional strengths, this time in relation to expertise for guiding the State in devising reforms. DeGrasse acknowledged the legislature's superior positioning in partnering with the Governor and other governmental actors like the Regents, State Education Department and Board of Education who 'have far greater

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[117] ibid 113.

[118] ibid.

[119] *CFE IIa* (n 110) 113.

[120] ibid.

expertise than this court in crafting solutions to the educational problems discussed in this opinion'.[121]

While prioritising Institutional Complementarity and Systemic Compliance by deferring to the legislature to devise state-wide education financing reforms, DeGrasse J still sought to optimise Effective Relief. As mentioned above, the remedial order lists the essential resources which must be provided as part of a 'sound basic education', making it clear that the reforms need to satisfy this constitutional minimum:

1. Sufficient numbers of qualified teachers, principals and other personnel.
2. Appropriate class sizes.
3. Adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum.
4. Sufficient and up-to-date books, supplies, libraries, educational technology and laboratories.
5. Suitable curricula, including an expanded platform of programs to help at-risk students by giving them 'more time on task'.
6. Adequate resources for students with extraordinary needs.
7. A safe orderly environment.[122]

This fleshed out the constitutional standard of education adequacy that had to be applied in ascertaining the cost of a 'sound basic education'. Without setting out these essential resources, the remedy would not be tethered to a constitutional standard and thus not provide Effective Relief for the state's failure to provide a 'sound basic education'.

DeGrasse J further stipulated five parameters for reform to guide the legislature in addressing the shortcomings of the current funding system. The first two parameters optimise Effective Relief by requiring the reforms to

1. Ensur[e] that every school district has the resources necessary for providing the opportunity for a sound basic education.
2. Tak[e] into account variations in local costs.[123]

These parameters counterbalance the deference shown by the trial court in leaving the legislature to devise the necessary reforms, as they make explicit the causal link between

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[121] ibid 114.

[122] ibid 114–115.

[123] ibid 115.

the constitutional standard of education adequacy and the financing system. Similarly, the third parameter promotes Systemic Compliance by requiring the reforms to

> 3. Provid[e] sustained and stable funding in order to promote long-term planning by schools and school districts.[124]

This third parameter requires the state to consider the systemic context of education financing and devise future-oriented, comprehensive reforms rather than piecemeal modifications targeting only the most glaring constitutional deficiencies. The fourth and fifth parameters for reform speak to Institutional Responsiveness and will be addressed in Section IV below in the discussion about promoting accountability for compliance.

By directing the State to 'cash out' a clearly defined constitutional standard of education adequacy within certain parameters, DeGrasse J's remedial order reflects an optimal institutional division of constitutional labour: the court sets out the constitutional standard of education adequacy and clear parameters for reform to ensure Effective Relief under the Education Article, while deferring to the superior positioning of the legislature for ascertaining what this requires in budgetary terms. This prioritisation of Institutional Complementarity is justified as an initial remedy for the state's failure to fulfil its positive duty, where the scale of systemic relief—as cashed out in budgetary terms—still needed to be ascertained. It also goes hand-in-hand with the optimisation of Systemic Compliance, achieved by expanding the scope of systemic relief to encompass state-wide education financing reform.

B. CFE IIc

After a divided Appellate Court reversed DeGrasse J's decision on both the law and facts, the case reached the Court of Appeals. The split on the Court of Appeals in *CFE*

[124] ibid.

IIc reflects a different weighting of the Remedial Principles among the three judges who delivered opinions: Kaye CJ (Opinion of the Court), Smith J (concurring) and Read J (dissenting). Kaye CJ's judgment offers an excellent demonstration of principled remedial reasoning, reaching an outcome that closely resembled the trial court's order while carefully justifying any points of divergence. Her most significant modification to the trial court's remedy was a reduction in the scope of relief from state-wide reform to city-wide reform, reflecting a more constrained approach to the court's role in promoting Systemic Compliance. Smith J's concurrence supported state-wide reform while also advocating for a more demanding constitutional floor for education adequacy in the form of the Regents Learning Standards. This arguably conflates constitutional standards with policy preferences, reflecting a suboptimal institutional division of constitutional labour. Read J's dissent took the other extreme by insisting that the indeterminacy of the court's definition of a 'sound basic education' would inevitably lead the court to exceed its proper institutional role. She thus allowed constitutional standards to be swallowed up within the purview of policymakers, reflecting a suboptimal vision of Institutional Complementarity in the opposite direction.

1. Fleshing Out the Constitutional Standard of Education Adequacy

The first major point of divergence among the three opinions delivered by the Court of Appeals in *CFE IIc* concerned the institutional division of constitutional labour in fleshing out the content of a 'sound basic education'. Answering the 'paramount' legal question posed by the appeal as to whether the trial court had correctly defined a 'sound basic education', Kaye CJ affirmed the constitutional standard of education adequacy fleshed out by DeGrasse J with its purposive orientation towards preparing children for productive employment and civic participation.[125] The Opinion of the Court also embraced the trial court's dynamic interpretation of a 'sound basic education' that is contextually sensitive to the evolving demands of modern society.[126] Kaye CJ defended the institutional division of constitutional labour that this implies, arguing in her 'concluding remarks, against the backdrop of the dissent', that courts are 'well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government—not in order to make policy but in order to assure the protection of constitutional rights'.[127] Comparing this constitutional standard to the quality of education actually provided in New York City public schools, Kaye CJ observed that 'tens of thousands of students are placed in overcrowded classrooms, taught by unqualified teachers, and provided with inadequate facilities and equipment. The number of children in these straits is large enough to represent a systemic failure.'[128] Upholding the trial court's assessment of the evidence, Kaye CJ concluded that whether measured by the essential 'inputs' or 'outputs' of education, the schoolchildren in New York City were not receiving a sound basic education as mandated by the Constitution,[129] and that this could be attributed to the causal link established between funding and educational opportunity.[130]

Smith J's concurrence argued for a more demanding constitutional floor in the form of the Regents Learning Standards, which offered more precise but also more ambitious standards than the 'essentials' relied on by both the trial court and Kaye CJ to

[125] *CFE IIc* (n 1) 905-908.

[126] ibid 905.

[127] ibid 931.

[128] ibid 914.

[129] ibid 919.

[130] ibid 919-925.

define a ‘sound basic education’. Smith J’s preference for the Regents Learning Standards arguably conflates the constitutional floor of education adequacy with the more aspirational norms and standards set out as State policy. Affirming the trial court’s reasoning, Kaye CJ rejected the Regents Learning Standards for exceeding the constitutional minimum of adequacy required for a ‘sound basic education’ and for ‘effectively ceding to a state agency the power to define a constitutional right’.[131] The majority opinion therefore draws a nuanced but decisive line between the court’s mandate to define constitutional standards and the legislative and executive tasks of developing and implementing policy that gives effect to—and even strives to surpass—those standards.

Read J’s dissent turns on the indeterminacy of the majority’s definition of a ‘sound basic education’ as a dynamic standard of education adequacy and its remedial implications for the court’s role vis-à-vis the executive and legislature. Picking up on the tension between the less precise list of ‘essentials’ favoured by the majority and the aspirational but more concrete Regents Learning Standards favoured by Smith J, Read J observes that:

> The majority’s dilemma is easy to appreciate. Recognising the Judiciary’s limitations as an education policymaker, my colleagues are reluctant to create a detailed quality standard by which to define the State’s obligation under the Education Article. But they are also unwilling to cede to the Board of Regents and the State Education Department the power to define (and in the future, redefine) what is claimed to be a constitutional principle (albeit a dynamic one), not an education policy decision. As a result, the standard that the majority has created—a ‘meaningful high school education’ that prepares students ‘to function productively as civic participants’—is illusory.[132]

Read J’s uneasiness lies in the difficulty of enforcing compliance with a standard that is an indeterminate and moving target. She claims the majority’s constitutional standard of education adequacy has ‘no objective reference point’, leaving the court ‘without any way

[131] ibid 907.

[132] ibid 954.

to measure whether it has (or may be) met'.[133] Her dissent therefore concludes with the reflection that although 'the majority sincerely sees itself as interpreting constitutional commands, a proper and solemn judicial function' the Court is in fact entering the political fray by 'making policy choices and value judgments constitutionally committed to the other branches of government'.[134] This does not so much reflect a different weighting of Institutional Complementarity as much as a fundamentally different conception of what the optimal institutional division of constitutional labour should look like.

2. Cashing Out the Constitutional Standard of Education Adequacy

Kaye CJ's cautious but confident engagement with the polycentric aspects of education financing reform shows, contrary to Read J's insistence otherwise, that it is possible for courts to enforce a constitutional standard of education adequacy without straying into policymaking. Kaye CJ began her justification of remedial decision-making by responding to the remedial options put forward by the parties. The plaintiffs foregrounded the reason for the State's failure to provide a sound basic education by pointing to its long track record of inaction with regards to education finance reform, in spite of its knowledge of the inadequacy of the system.[135] Reflecting their prioritisation of Institutional Responsiveness to address this lack of political will, the plaintiffs urged the Court to initiate a dialogue with the legislature by articulating detailed guidelines for restructuring the system and stipulating strict deadlines for the provision of the necessary

[133] ibid 952.

[134] ibid 959.

[135] ibid 925.

resources required to effect such reforms.[136] The State strongly opposed this proposal, insisting that the Court limit itself to a simple order directing the State to rectify the constitutional deficiencies identified.[137] This proposal, which found favour with Read J in her dissent, accords total discretion to the relevant political bodies to decide how reform should be effected.

Characterising '[b]oth extremes [as] problematic', Kaye CJ maintained that there were remedial possibilities capable of providing Effective Relief which did not require courts to exceed the appropriate bounds of their discretionary remedial power.[138] Her articulation of this remedial challenge reflects the imperative of Institutional Complementarity in seeking the best institutional division of constitutional labour:

> 'We are, of course, mindful—as was the trial court—of the responsibility, underscored by the State, to defer to the Legislature in matters of policymaking, particularly in a matter so vital as education financing, which has as well a core element of local control. We have neither the authority, nor the ability, to micromanage education financing. By the same token, in plaintiffs' favour, it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them. Surely there is a remedy more promising, and ultimately less entangling for the courts, than simply directing the parties to eliminate deficiencies, as the State would have us do.'[139]

The rhetorical question at the end of this passage recognises that a court-prompted remedy that concedes absolute discretion to the State in reforming the education financing system is not guaranteed to be 'ultimately less entangling' for the Court, as it has a constitutional mandate to 'safeguard' rights by ensuring their fulfilment through the remedial process.[140] Referencing the long-running education financing litigation in New Jersey,[141] Kaye CJ pointed out the potential for an order that simply identifies

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[136] ibid.

[137] ibid.

[138] ibid.

[139] ibid.

[140] ibid.

[141] *Robinson v Cahill* 303 A2d 273 (NJ 1973); *Abbott v Burke* 119 A2d 287 (NJ 1990).

constitutional deficiencies to trigger ongoing compliance litigation requiring increasingly detailed remedial directives.[142] With this backdrop in mind, she characterises the remedy in *CFE IIc* as 'an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation'.[143] This offers the important insight that in exercising their discretionary remedial power, courts need to negotiate their way through, rather than completely bypass, the complexities of polycentric problems to provide Effective Relief for the State's failure to fulfil rights.

Like the trial court, Kaye CJ did not impose the Court's view of what amount was required for the State to fulfil its positive duty in respect of education financing, but instead set the constitutional standard for what would constitute a 'sound basic education' and required the government to put in place a budget that would achieve that standard. Her remedial order therefore resembled the trial court's structural interdict directing the State to ascertain the cost of a 'sound basic education' and to reform the education financing system accordingly. She defended this institutional division of constitutional labour on the ground that it allows the court to avoid 'micromanag[ing] education finance'[144] while not shying away from its task of enforcing the state's positive duties. This speaks to the rationale of Institutional Complementarity, namely that the best institutional division of constitutional labour will draw on the comparative institutional strengths of the judiciary, legislature and executive in their joint enterprise of fulfilling human rights. By affirming the constitutional standard of education adequacy as

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[142] *CFE IIc* (n 1) 931-932.

[143] ibid 931.

[144] ibid 925.

fleshed out by DeGrasse J, her remedial order set clear parameters within which the legislature could exercise its discretion to reform the school financing system.

While deferring to the legislature to 'cash out' what the constitutional standard of education adequacy requires in budgetary terms, Kaye CJ squarely placed ultimate responsibility on the State to ensure every public school in New York City receives the resources necessary for providing a 'sound basic education'. In an attempt to deflect full responsibility for ensuring the public school system provides the constitutionally required quality of education, the State argued that the current constitutional deficiencies could be attributed to causes other than its financing system. The State pointed to four other factors in its attempt to undermine the causal link between education financing and educational opportunity: (1) socio-economic disadvantage at under-performing schools; (2) comparative levels of education funding between New York and other states; (3) mismanagement by the City; and (4) the local control exercised over funding. Kaye CJ correctly discerned that these arguments 'more properly concern the apportionment of responsibility among various government actors than causation'[145] and dismissed them on the ground that 'the State has ultimate responsibility for the conduct of its agents and the quality of education in New York City public schools'.[146] In responding to each line of argument, her reasoning remained focused on the legislature as the primary duty-bearer under the Education Article and holds a consistent line as to the best institutional division of constitutional labour between the court, legislature and executive. Kaye CJ pointed out that the State was free to address these contributory causes in its reforms, but that the Court had no mandate to prescribe a comprehensive overhaul of the

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[145] ibid 920.

[146] ibid 929.

education system. It is to this question of the scope of systemic relief to be ordered by the Court that we now turn.

3. The Scope of Systemic Relief

The strict adherence to the Court's constitutional mandate which led Kaye CJ to refrain from speculating how responsibility for remedying constitutional deficiencies should be apportioned between the City and the State also grounded her decision to narrow the scope of systemic relief awarded by the trial court. While DeGrasse J's order optimised Systemic Compliance by directing the State to ascertain the cost of a 'sound basic education' in districts around the entire State, Kaye CJ confined this threshold task to cashing out the constitutional standard of education adequacy in respect of New York City only.[147] She justified this as a matter of responding to the adequacy claim as formulated and established by the plaintiffs:

> Courts deal with actual cases and controversies, not abstract global issues, and fashion their directives based on the proof before them. Here the case presented to us, and consequently the remedy, is limited to the adequacy of education financing for the New York City public schools, though the State may of course address statewide issues if it chooses.[148]

By restricting the remedy to the strict framing of the claim as formulated by the claimants, Kaye CJ demonstrates sensitivity to the constraint of judicial independence in the responsive exercise of discretionary remedial power.[149] However, in the context of the State's positive duty to ensure a state-wide system that offers a 'sound basic education', it neglects Systemic Compliance by artificially isolating the State's duty in

[147] ibid 930.

[148] ibid 928.

[149] See discussion in Chapter Three, Section II.C.

respect of New York City public schools from its systemic duties of education financing across the whole State.

The scope of systemic relief was not only a point of disagreement between the trial court and Court of Appeals, but also another significant point of divergence between Kaye CJ's Opinion for the Court and Smith J's concurrence. Smith J argued that the entire education financing system had been rendered constitutionally infirm, necessitating state-wide reform:

> Despite constant fine-tuning, the formulas have impeded the duty of the Legislature to maintain and support an effective system of public schools in New York City. In fact, their Byzantine complexity makes it possible for aid to be distributed in an arbitrary manner that bears no relationship between educational goals and costs associated with meeting those needs. Consequently, the formulas are incompatible with the Legislature's duty to provide a sound basic education to New York City students. Since the formulas are used to distribute aid to all the schools in the state, the remedy must necessarily affect the entire interdependent school system.[150]

By recognising the complexity and contingency of New York City funding formulas on the state-wide education financing system, Smith J's proposed remedy optimised Systemic Compliance in two respects that differed from the order granted by Kaye CJ. First, he concluded that the remedy should be state-wide in scope, and second, he proposed that the remedy should include a reformulation of the current formula for distributing aid to New York City public schools.[151] Faced with the polycentricity of education financing, Kaye CJ tried to sever the constitutional deficiencies in New York City public schools from the state-wide funding system, while Smith J advocated for a remedy that sought to ensure the entire education financing system would be brought into constitutional compliance.

With hindsight, two arguments offered by Smith J in support of his proposal to expand the scope of systemic relief are worth highlighting as they offer prophetic

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[150] *CFE IIc* (n 1) 947.

[151] ibid 932.

warnings ahead of what would follow in *CFE III* and *NYSER*. In justifying the need for reformulating the state funding formulas, Smith J noted that while '[v]irtually every document in the record prepared by the Regents or the SED dealing with funding has been critical of the formulas', there was little prospect for change. As Smith J recognised, this blockage results from the institutional mismatch between education policymaking and education financing, since '[w]hile the Regents are responsible for establishing educational policy in the State, they have no equivalent power with respect to funding. That power is in the hands of the Governor and the Legislature.'[152] Foreshadowing the compliance challenges in *CFE III*, this insight identifies the risk that a lack of political consensus could stymie reform efforts unless the scope of relief mandates a state-wide overhaul of the education financing system.

In a second attack on the funding formulas, Smith J exposed the fiscal dependency of the so-called Big 5 cities (Buffalo, New York City, Rochester, Syracuse, and Yonkers) whose boards of education lack authority to levy taxes, in comparison to the autonomy that local boards of education enjoy in independent school districts.[153] Writing two years before the 2008 financial crisis, Smith J drew out the implications of this flaw in the funding formulas for inner city schools:

> One obvious problem for districts in the Big 5 is that during a fiscal crisis, local appropriations for schools may fall dramatically, affecting their ability to provide the opportunity for a sound basic education. The same is not necessarily the case in fiscally independent districts since property values tend to be stable, and in fact, may rise during difficult economic times.[154]

While Kaye CJ retracted the trial court's parameter that the reforms ensure 'sustained and stable funding', Smith J insisted that the success of the reforms in New York City public schools was in fact dependent on a state-wide remedy that addressed these

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[152] ibid 943.

[153] ibid 940-941.

[154] ibid 941.

systemic flaws in the funding formulas. Smith J's reasoning therefore reflects the fact that optimising Systemic Compliance also facilitated a greater optimisation of Effective Relief. Given the freshly instituted *NYSER* compliance litigation, hindsight shows the strength of Smith J's remedial decision-making in this regard.

On the other extreme of this debate, Read J's dissent expresses discomfort with even the narrower scope of systemic relief granted by Kaye CJ. Recognising the polycentricity of education financing and the complex contributory causes of constitutional deficiencies in the quality of schooling, Read J signalled concern that the precedent of ordering City-wide reform is a 'recipe for "limitless litigation"' as the 'success of plaintiffs' theory here will no doubt inspire a host of future litigants representing other communities and school districts throughout the State'.[155] Kaye CJ dismissed this prediction that the *CFE* case would open the floodgates of litigation by 'necessarily inspir[ing] a host of imitators throughout the state'.[156] Somewhat ironically given the failure of the Title VI claim, her rebuttal pointed to the stark inequalities that facilitated the success of the plaintiffs in this case:

> Plaintiffs have prevailed here owing to a unique combination of circumstances: New York City schools have the *most* student need in the state and the *highest* local costs yet receive some of the *lowest* per-student funding and have some of the *worst* results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts.[157]

Kaye CJ's argument is based on New York City schools being the worst-off in the state—a strategic advantage that no doubt made their adequacy claim easier to prove, but it does not preclude similarly situated schools in other cities or districts from bringing analogous claims. Rather counter-intuitively, Smith J's expanded scope of systemic relief goes further to address Read J's concern by requiring the State to undertake

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[155] ibid 956.

[156] ibid 932.

[157] ibid 932 (emphasis in original).

comprehensive reforms that meet its state-wide positive duty, thereby optimising Systemic Compliance from the outset.

IV. Promoting Accountability for Compliance: *CFE II*

In both *CFE IIa* and *CFE IIc*, the remedy took the form of a structural interdict directing the State to ascertain the cost of a 'sound basic education' and then to reform the education financing system accordingly. I argued above that this prioritised Institutional Complementarity by deferring to the legislature to 'cash out' the constitutional standard of education adequacy as fleshed out by the court. This institutional division of constitutional labour is optimal as an initial court order for systemic reform in the paradigmatically polycentric context of education financing: the legislature, as the primary duty-bearer under the Education Article, is given the first opportunity to devise reforms to the education financing system, but the court sets clear parameters to ensure such reforms are tied to the constitutional standard of a 'sound basic education'.

The deference shown by the court to the legislature, while appropriate in the first instance, needed to be complemented by safeguards to promote accountability for compliance. In evaluating the remedial orders in *CFE IIa* and *CFE IIc* for Institutional Responsiveness, the key insight that distinguishes Read J's dissent from Kaye CJ and DeGrasse J's orders is that deference in respect of policymaking does not imply a lack of accountability for compliance. On the contrary, an optimal remedy will include safeguards that are responsive to the institutional reasons that could undermine full compliance. By retaining supervisory jurisdiction and insisting on a system of accountability to measure whether the reforms actually provide the opportunity for a 'sound basic education', Kaye CJ's remedial order accommodated the eventuality of non-compliance but did not optimise Institutional Responsiveness owing to her presumption that the legislature has political will to reform the education financing system. Her rejection of the trial court's transparency parameter failed to appreciate how the lack of transparency in the funding *process* undermined the prospect of reform efforts producing effective *outcomes*. For this reason, the trial court's parameters for reform demonstrated better Institutional Responsiveness by coupling accountability for effective outcomes with greater transparency in the funding process.

A. CFE IIa: Continued Deference Conditioned on Compliance

As noted above, the trial court's remedial order included clear parameters for guiding the legislature's reform of the education financing system. The fourth and fifth parameters set out by DeGrasse J promoted accountability for compliance by prescribing that the reforms had to:

> 4. Provid[e] as much transparency as possible so that the public may understand how the State distributes school aid.
> 5. Ensur[e] a system of accountability to measure whether the reforms implemented by the Legislature actually provide the opportunity for a sound basic education.[158]

The transparency parameter sought to remedy the 'unnecessarily complex and opaque' distribution of State aid in which 'the formulas do not operate neutrally'.[159] It seeks to enhance the legitimacy of the reforms and expose any improper political influences on the distribution of state funds, thus demonstrating Institutional Responsiveness to the lack of political will that might undermine compliance. The accountability mechanism promotes compliance by requiring the reforms implemented to actually provide Effective Relief in the form of the opportunity to obtain a 'sound basic education'. This also serves

[158] *CFE IIa* (n 110) 115. My reference to the fifth parameter omits the directive to ensure the reforms 'remedy the disparate impact of the current finance system' as this refers to the Title VI violation which was overturned by the Appellate Division and Court of Appeals in *CFE IIb* and *CFE IIc*.

[159] ibid 83.

a valuable practical function as a way of detecting non-compliance. These two parameters promoting compliance were given teeth through the retention of supervisory jurisdiction by the trial court. DeGrasse J set a date for the State to report to the Court on its progress as well as a final deadline for the implementation of reforms. Taken together, these parameters for reform, reporting requirements and final deadline for implementation optimise Institutional Responsiveness by serving as safeguards for compliance to counterbalance the leeway afforded to the State in devising reforms.

At the same time, however, DeGrasse J added a caveat to his prioritisation of Institutional Complementarity over Effective Relief by warning that the court's deference to the legislature is contingent on compliance by the State in implementing the necessary reforms. After recognising the legislature as the primary duty-bearer and noting its superior positioning to partner with the executive in devising reforms, DeGrasse J was quick to add a qualification:

> There is no need, at least at this time, for the court to supersede the Legislature, the Governor, the State Education Department, and the Regents in imposing a remedy. That said, the court's deference to the coordinate branches of State government is contingent on these branches taking effective and timely action to address the problems set forth in this opinion. The parlous state of the City's schools demands no less. The court will not hesitate to intervene if it finds that the legislative and/or executive branches fail to devise and implement necessary reform.[160]

This demonstrates Institutional Responsiveness as the deference shown at this first instance is premised on the principle that the State *should* have the political will to comply with its constitutional duties. While the polycentric nature of education financing reform justifies this initial calibration of Institutional Responsiveness, DeGrasse J's warning implies that non-compliance would be met with an escalated remedial response in which the court takes on a more interventionist role.

[160] ibid 114.

B. CFE IIc: Accountability for Effective Outcomes over Transparency of Process

Before the Court of Appeals in *CFE IIc*, the State objected to the Court setting parameters for reform on the ground that reforms had already been introduced which remedied the constitutional deficiencies identified by the trial court.[161] These included several reforms initiated since the close of the trial, such as the federal No Child Left Behind Act of 2001 and the state-wide procedure called Schools Under Registration Review, which identifies under-performing schools and monitors their progress in implementing a 'corrective action plan'.[162] This argument boiled down to a claim that the remedial dimension of the case was moot and court-prescribed parameters therefore superfluous. Kaye CJ rejected this argument on both procedural and principled grounds. Firstly, she relied on the fact that the Court's task was to decide the case as presented and so could not speculate on how far existing reforms went towards compliance with constitutional standards. In short, she concluded that '[a]ll of these initiatives promise, but await, demonstrable outcomes'.[163] Secondly, she rejected the State's alleged pre-emptive compliance for the principled reason that the mechanisms used to identify deficiencies were not based on the constitutional standard of education adequacy fleshed out by the Court. Kaye CJ therefore refused to compromise on the need for the accountability system to be directed towards achieving a 'sound basic education' as defined by the Court to ensure the reforms provided Effective Relief.

Having rejected the State's argument that existing initiatives obviated the need for any court-prescribed parameters to guide legislative reform efforts, Kaye CJ confirmed

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[161] *CFE IIc* (n 1) 926.

[162] ibid.

[163] ibid 927.

the trial court's parameter that 'the new scheme should ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education'.[164] This mechanism for assessing the effectiveness of reforms ensures there will be no gap between the constitutional standard of education adequacy as fleshed out by the Court and the resources made available to New York City public schools. As pointed out above, this accountability mechanism for Effective Relief is not only aimed at ensuring compliance with constitutional standards, but also serves the corollary function of detecting non-compliance. Declaring that '[t]his remedy is extraordinary, if not unprecedented',[165] Read J's dissent takes issue with the prolonged remedial process that this accountability mechanism implies, as the trial court is required to 'review the Legislature's efforts to determine if under the new funding scheme "inputs and outputs improve to a constitutionally acceptable level"'.[166] This objection to an accountability mechanism that measures the effectiveness of the State's reforms fails to demonstrate the Institutional Responsiveness that should underlie the court's exercise of discretionary remedial power. An optimal remedy holds the State accountable for compliance with constitutional standards rather than simply specifying constitutional deficiencies and leaving the fulfilment of rights to the mercy of policymakers.

While this parameter requiring an accountability mechanism aims to ensure the reforms produce effective *outcomes*, Kaye CJ rejected the trial court's parameter concerning the transparency of the funding *process*. She recognised the desirability of transparency in decision-making about how funds are allocated across school districts, but held that this was not factually possible for the Court to enforce:

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[164] ibid 930.

[165] ibid 958.

[166] ibid 957.

> [W]e know of no practical way to determine whether members of the political branches have complied with an order that the funding process become as transparent as possible, and we therefore decline to incorporate such a directive into our order. No one, however, disputes the trial court's description of the existing education funding scheme as needlessly complex, malleable and not designed to align funding with need.[167]

Admittedly, DeGrasse J did not elaborate on what practical steps could be taken by the legislature to meet his requirement of 'providing as much transparency as possible so that the public may understand how the State distributes school aid'.[168] However, Kaye CJ arguably gave up before trying to find creative possibilities for alleviating the undisputed lack of transparency in the education financing system, instead putting her confidence in the accountability mechanism to promote compliance. She therefore demonstrated a single-minded focus on ensuring the reforms produced effective *outcomes* and left the *process* of reform beyond the remedial scope of the Court. By contrast, Smith J's concurrence was more alert to the importance of ensuring transparency in the funding process as he recognised that it was its 'Byzantine complexity [that] makes it possible for aid to be distributed in an arbitrary manner that bears no relationship between educational goals and costs associated with meeting those needs'.[169] By drawing this link between process and outcome, Smith J's reasoning reflects a recognition that accountability for compliance is optimised by scrutinising *both* the *outcomes* of reform for their effectiveness and the funding *process* for its transparency.

Kaye CJ's rejection of the trial court's transparency parameter stems from her optimism that the Court's order in *CFE IIc* will not be met with legislative intransigence. Responding to Read J's discomfort about the continued involvement of the Court in compliance litigation, she dismisses 'the dissent's belief that in New York any constitutional ruling adverse to the present scheme will inevitably be met with the kind

[167] ibid 929.

[168] *CFE IIa* (n 110) 115.

[169] *CFE IIc* (n 1) 947.

of sustained legislative resistance that may have occurred elsewhere'.[170] Working off this hypothesis, Kaye CJ's remedial order is calibrated to the presumed presence of political will to implement the required reforms to the education financing system. Her opinion for the majority in *CFE IIc* does not contain the trial court's caveat that made continued deference to the legislature contingent on compliance. Kaye CJ nevertheless considered it necessary for the trial court to maintain supervisory jurisdiction over the implementation of the budgetary reforms in the hope that 'fixing a few signposts in the road yet to be traveled by the parties will shorten the already arduous journey and help to achieve the hoped-for remedy'.[171] She set a deadline of 30 July 2004 by which the reforms had to be implemented in recognition that the remedial process 'naturally cannot be completed overnight',[172] but did not incorporate the trial court's mid-way reporting requirement to monitor the progress made by the legislature towards constitutional compliance.

Read J's dissent is cynical about the 'anticipated "dialogue" with the Legislature'[173] that underlies the majority's retention of supervisory jurisdiction. She characterises the continued involvement of the Court in overseeing the implementation of reforms as exceeding the appropriate bounds of the Court's remedial powers. Indeed, Read J believes that, having found a constitutional deficiency, a discrete declaratory order should bring a clear-cut end to litigation, and she therefore sees no active or sustained role for courts in an extended remedial process:

> Having determined that the State is not satisfying its constitutional obligation with respect to the education of New York City's public schoolchildren, we should—as the State requests—simply specify the constitutional deficiencies. It is up to the Legislature, as the entity charged with primary responsibility under the Education Article for maintaining the State's system of public

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[170] ibid 932.

[171] ibid.

[172] ibid 930.

[173] *CFE IIc* (n 1) 959.

> education, and the Executive, who shares responsibility with the Legislature, to implement a remedy. This lawsuit should be at an end.[174]

Read J's belief that the court's task should end with the finding of a constitutional deficiency stems from her static and strict separation of institutional roles, with the judiciary being responsible for the interpretation of rights and the political branches of government being charged with deciding how such rights should be implemented. The leaves a declaratory order as the only remedial option available to the Court, and no way of knowing whether the reforms—if implemented—comply with the State's positive duty under the Education Article.

Kaye CJ's remedial order in *CFE IIc* shows how her sophisticated handling of a polycentric problem opened up remedial possibilities that held far more promise than the simple declaratory order to which Read J's approach was confined. Like the trial court, she deferred to the legislature to cash out the constitutional standard of education adequacy but affirmed the need for a system of accountability to ensure such reforms actually provided the opportunity for obtaining a 'sound basic education'. The retention of supervisory jurisdiction was a valuable component of this institutional division of constitutional labour as a way of promoting accountability for compliance within the deadline set by the Court. However, Kaye CJ's order presumed the legislature possessed the necessary political will to reform the education financing system, reflected in her separation of the effectiveness of reforms from the transparency of the funding process. While the system of accountability and retention of supervisory jurisdiction entertain the possibility of non-compliance, the remedial order did not optimise Institutional Responsiveness by incorporating a prophylactic measure targeted at the particular risk of legislative inertia that could undermine compliance. By contrast, DeGrasse J's transparency parameter sought to address the shortcomings in the funding process which

[174] ibid 958.

contribute to the inadequate allocation of resources to New York City public schools. By targeting the complexity and opacity of the current funding formulas, the transparency parameter is carefully calibrated to the institutional reasons underlying the current deficiencies in the system, thus optimising Institutional Responsiveness.

V. Non-Compliance as a Catalyst for Remedial Innovation: *CFE III*

A. Breaking the Political Bind: The Appointment of an Independent Panel of Referees

Just over a year after the Court of Appeals handed down its judgment in *CFE IIc*, the deadline passed for the State's implementation of the required reforms. On 3 August 2004, the trial court appointed a panel of three referees to 'hear and report with recommendations' on the measures taken by the State to comply with the order in *CFE IIc*.[175] The appointment of referees was DeGrasse J's way of fulfilling the Court of Appeal's requirement that the trial court review the Legislature's efforts to determine if the reforms improve educational inputs and outputs to a constitutionally acceptable level.[176] The three referees on the 'blue-ribbon panel'[177] were 'distinguished members of the bar':[178] the former Dean of Fordham University School of Law, John Feerick, and two former Associate Justices of the Appellate Division of the New York Supreme Court, E. Leo Milonas and William C. Thompson.

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[175] Order of Reference, *Campaign for Fiscal Equity v State of New York* (3 August 2004) <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 1 June 2018 (Order of Reference).

[176] *CFE IIc* (n 1) 930, 957.

[177] *CFE IIIc* (n 2) 56.

[178] *Order of Reference* (n 175).

Since the appropriate scope of the referees' mandate became a source of controversy in *CFE IIIc*, it is worth comparing DeGrasse J's Order of Reference to the mandate as framed in the Report and Recommendations of the Judicial Referees. The Order of Reference describes the mandate as follows:

> Pursuant to CPLR 4320 the court appoints three referees to hear and report with recommendations on what measures defendants have taken to follow the foregoing directives and bring this State's school funding mechanism into constitutional compliance insofar as it affects the New York City School System. The referees shall also identify the areas, if any, in which such compliance is lacking. The report of the special referees shall address but shall not be limited to inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning.[179]

The Order of Reference is clearly directed at ascertaining the extent of the state's compliance with the remedial order in *CFE IIc*, to be assessed with reference to the inputs identified by the Court. Implicit in this framing is that the 'recommendation' to be made pertains to whether or not the State has complied with the Court's directives.

The Referees, however, summarise this mandate as follows in their Report:

> On August 3, 2004, the Court appointed us as Judicial Referees, pursuant to CPLR § 4320, to 'hear and report with recommendations' by November 30, 2004, and specifically to: (1) assess 'what measures Defendants have taken to follow the [Court of Appeals'] directives'; (2) 'identify the areas, if any, in which...compliance is lacking'; and (3) make recommendations on how to 'bring the State's school funding mechanism into constitutional compliance insofar as it affects the new York City School System.' In addition, the Court directed us to address how the measures taken by the defendants will ensure improved 'inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning.'[180]

While (1) and (2) accurately capture the mandate in the *CFE IIIa* Order of Reference, there is a subtle shift of emphasis in (3) in relation to what the focus of the referees 'recommendations' should be. The *CFE IIIa* Order of Reference calls for recommendations on 'what measures have been taken to follow the foregoing directive *and* bring this State's school funding mechanism into constitutional compliance', with the emphasised conjunction 'and' meaning 'in order to'. The referees, however, interpreted

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[179] ibid.

[180] Report and Recommendations of the Judicial Referees, *Campaign for Fiscal Equity v State of New York* (30 November 2004) <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 1 June 2018 (Referees' Report).

their role to make recommendations as having two separate parts: first, in relation to 'what measures have been taken to follow the foregoing direction' (ie whether there has been compliance) and second, in relation to 'bring[ing] this State's school funding mechanism into constitutional compliance' (ie what reforms would achieve compliance). This second part expands the scope of the referees' mandate from making recommendations on *whether* the State has complied with *CFE IIc* to making recommendations on *how* the State's school funding mechanism could be brought into compliance.

As stipulated in CPLR 4320,[181] the procedure followed by the referees for carrying out this (expanded) mandate resembled a trial without a jury, but sought to benefit from the input and expertise of a wide range of stakeholders beyond the parties:

> To fulfil that mandate, we have reached broadly, obtaining input not just from the parties themselves, but also from a long list of *amici curiae*. We have conducted many hearings, held multiple oral arguments, requested and received extensive written submissions, and heard from numerous witnesses.[182]

In developing an initial schedule for proceedings, the referees issued an open invitation encouraging the parties to put any relevant evidence and testimony on record.[183] All the compliance plans presented to the panel of referees were, by agreement between the parties, admitted into evidence; uncontested facts were stipulated and sworn witness statements accepted into evidence as direct testimony (with any objections being

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[181] Art 43 of the Civil Practice Law and Rules, which deals with 'Trial By a Referee', contains s 4320 on 'Reference to report':

> (a) Conduct of trial: A referee to report shall conduct the trial in the same manner as a court trying an issue without a jury.
>
> (b) Report; transcript. The referee shall file his report, setting forth findings of fact and conclusions of law, within thirty days after the cause or matter is finally submitted. Unless otherwise stipulated, a transcript of the testimony together with the exhibits or copies thereof shall be filed with the report.

[182] Referees' Report (n 180) 3.

[183] ibid 7.

addressed by the referees); and in spite of being *amici curiae*, the City of New York and the Regents were both granted permission to present testimony.[184] The referees then held 7 days of evidentiary hearings featuring 15 witnesses presented by the State, plaintiffs, City and Regents, and formal submissions received from 21 *amici curiae*, resulting in nearly 1,300 pages of transcript.[185]

The referees concluded that the State had failed to comply with the remedial order in *CFE IIc*.[186] Although the State maintained they had complied with the Court of Appeal's first directive to ascertain the cost of a 'sound basic education' in New York City, the referees found the methodology followed in 'cashing out' the constitutional standard of education adequacy was flawed, meaning the State had failed even in this threshold task.[187] It was common cause that no reforms had been implemented, so non-compliance was self-evident in respect of this core directive. Upon submitting the Governor's compliance plan to the referees at the start of proceedings, the Assistant Attorney-General attributed the failure to implement reforms to a political deadlock between the legislature and executive:

> Unfortunately the two houses of the Legislature and the Governor have not been able to agree upon a single unified plan for submission to this panel. Earlier this week agreement was reached on funding for the 2004-05 school year, but there is not yet enacted legislation setting forth a multi-year funding plan or specifying what accountability measures should be implemented.[188]

This stalemate between Governor Pataki and the legislature had been foreshadowed by Smith J's observation in *CFE IIc* that, in spite of virtually unanimous criticism of the financing formulas within the SED and the Regents, it was the legislature that wielded

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[184] ibid 8.

[185] ibid 8–11.

[186] ibid 3.

[187] ibid 12–24.

[188] Office of the Attorney General, 'Letter to the Special Referees, CFE v State of New York' (12 August 2004) <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 1 June 2018.

power over funding.[189] Reform efforts could therefore be thwarted by the institutional mismatch between the branches of government responsible for education policymaking (executive) and education financing (legislature).

The legislative inertia underlying the failure to implement the reforms required by *CFE IIc* flows from the skewed political incentives produced by local control over education financing. In an excellent Harvard Law Review Note on school finance remedies, the authors argue that legislative inertia in reform efforts is partly caused by the disproportionate political influence enjoyed by property-rich districts and corresponding under-representation of school finance plaintiffs in the political process.[190] The collective action problem arises as legislators act in self-interest while also undervaluing the collective benefit of adequate educational opportunities for all students:

> Assuming that a better-educated citizenry is a collective good produced by school finance reform, cooperation among taxpayers to finance the reform would enhance the political feasibility of a legislative remedy. However, the asymmetry of benefits for two subgroups of taxpayers—those with children in low-wealth school districts and all other taxpayers—undermines the prospects for cooperation.[191]

Where a failure in representative democracy results from the correlation between property wealth and political influence,[192] the court has to find creative ways to overcome legislative inertia to ensure compliance with remedial orders.

Reflecting on the legislative inertia underlying the State's non-compliance with *CFE IIc*, the referees concluded that '[i]t therefore falls, by default, to the judiciary to fashion an appropriate remedy to ensure that the sound basic education mandate is honoured.'[193] After detailing their recommendations, the referees dedicated the final

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[189] *CFE IIc* (n 1) 943.

[190] 'Unfulfilled Promises: School Finance Remedies and State Courts' (n 35) 1072–1073.

[191] ibid 1080.

[192] ibid 1079.

[193] Referees' Report (n 180) 3.

section of their Report, headed 'Enforcing Compliance With Judicial Mandates', to justifying the court's exercise of 'broad remedial discretion to fashion equitable remedies'.[194] Explaining their institutional division of constitutional labour, the referees relied on *Levittown* to point out that the 'mere fact that a controversy is typically committed to another branch, or that the practical and political complexities of a case make it difficult for a court to fashion and enforce a remedy, certainly does not "dictate judicial abstention in every case"'.[195] Finally, the referees were quick to point out the trial court's caveat in *CFE IIa* that continued deference to the legislature was conditional on compliance, with DeGrasse J making it clear that the Court would not hesitate to intervene if the State failed to implement the required reforms.[196] Their Report concludes with a strong defence of the Court's responsibility to bring the State's education financing system into constitutional compliance: 'In providing a remedy that enforces that mandate, the Court would not be overstepping its bounds; to the contrary, it would be engaging in the most quintessential of judicial functions—protecting the constitutional rights of the citizenry'.[197]

B. CFE IIIa: Costing-Out Studies

The referees made six specific recommendations to the trial court for bringing the State's education financing system into constitutional compliance.[198] My evaluation of these

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194 ibid 50–54.

195 ibid 51. See discussion on remedial abstention, or court-prompted remedies, in Chapter Three, Section V.A.3.

196 ibid 52–53.

197 ibid 54.

198 ibid 4–7.

recommendations follows the structure of the Report, which in turn reflects the three directives issued by the Court of Appeals in *CFE IIc*: (1) to ascertain the cost of a sound basic education; (2) to reform the current system of financing school funding; and (3) to ensure a system of accountability.

1. Scrutinising the Cost of a Sound Basic Education

As noted above, the State claimed it had complied with the Court of Appeals' first directive to ascertain the cost of a 'sound basic education' in New York City. To assess whether the State had completed this threshold task in a satisfactory manner, the referees scrutinised the four costing-out studies submitted by the State, the plaintiffs, the City and the Regents. The referees define a costing-out study as follows:

> A costing-out analysis seeks to determine the funding necessary to provide the opportunity for a sound basic education. It requires determination of a student achievement benchmark, and then the use of a methodologically sound analysis to arrive at the funding levels necessary to achieve that benchmark.[199]

While the costing-out result reached by the plaintiffs' professional judgment method ($5.6 billion) and the City's detailed planning method ($5.406 billion) established very similar spending gaps, the State's successful school district method suggested the shortfall was far less ($1.93 billion). Since the referees recommended the combined use of the successful school district method and professional judgment method in future costing-out exercises, my discussion below focuses on these two studies presented by the State and the plaintiffs.

[199] ibid 12.

(a) The State's flawed application of the successful school district method

Scrutinising the State's application of the successful school district method, the referees found that the State's $1.93 billion costing-out conclusion rested on three flawed premises.[200] Firstly, the referees criticised the State's arbitrary use of a 50 per cent cost reduction filter. A successful school district analysis determines the operational costs incurred by 'successful' school districts across the State that have attained the required achievement benchmark, and then translates this figure into a standardised per-pupil cost. In applying this costing-out method, however, the State eliminated the 50 per cent highest spending districts from the group of successful school districts on the premise that they were inefficient.[201] The referees, following evidence presented by the witnesses and *amici curiae*, dismissed the 50 per cent cost reduction filter as an arbitrary mechanism aimed at driving down costs.[202] Secondly, the referees found that the per-pupil cost weighting (1.35) used by the State to account for the additional spending required for low-income students was 'materially too low'. They instead recommended a 1.5 weighting for low-income students, a figure that was nevertheless at the lower end of the Regents' recommended range of 1.5 – 2.[203] Thirdly, the State had applied an out-dated version of the regional cost adjustment index (the Geographical Cost of Education Index), and the referees accordingly recommended that the most recent version be used to calculate the adjustments needed to accommodate unique district-specific costs. Correcting for these three methodological flaws, the referees found that the adjusted

200 ibid 14.

201 ibid 13.

202 ibid 18–19.

203 ibid 22.

successful school district method more accurately produced an operating expenses gap of $5.63 billion, a figure very close to the conclusions reached using the other costing-out methods.[204]

(b) The plaintiffs' AIR/MAP study based on a professional judgment method

The professional judgment method followed in the plaintiffs' AIR/MAP study was commended by the referees and highly regarded by the witnesses and *amici curiae*.[205] The costing-out study was commissioned by three major independent foundations and enjoyed wide-spread approval among approximately 40 education advocacy, business and community groups.[206] It also incorporated the input of an impressive range of political stakeholders: representatives of the DOE, SED, both houses of the Legislature, the Governor's staff and the Zarb Commission (the Commission appointed by Governor Pataki to determine and recommend the actual dollar figures required for education financing and other reforms necessary for providing a sound basic education). In addition, the AIR/MAP researchers provided progress briefings to the relevant Senate and Assembly committees.[207] The study convened ten 'professional judgment panels' composed of educational professionals from across the State.[208] Through a series of simulation exercises, the panels considered and re-considered the needs for instructional

[204] ibid 15.

[205] ibid 25.

[206] ibid.

[207] ibid.

[208] ibid 26.

programs offered at elementary, middle and high school.[209] Detailing the rigorous process that then followed, the referees describe how these initial judgments of the panels were:

> (a) synthesized through a computer regression analysis undertaken by the research team;
> (b) re-considered first by a 'summary' professional judgment panel consisting of representatives of each of the original teams;
> (c) reviewed by a panel of expert consultants;
> (d) analyzed by a stakeholders group consisting of business representatives, legislators, parents and others; and
> (f) finally, reconsidered by the summary professional judgment panel.[210]

This method was not only thorough and inclusive but also transparent, as the entire process and all deliberations were compiled in a report released to the public.[211]

(c) The convergence of costing-out results

Having scrutinised the costing-out studies submitted by the parties, the referees felt reassured by the consistency in the results that emerged: $5.63 billion (State's adjusted successful school district analysis), $5.6 billion (plaintiffs' AIR/MAP study) and $5.406 billion (City's Sound Basic Education Plan).[212] They therefore settled on the figure of $5.63 billion as the additional operational cost required to provide a sound basic education in New York City. The approach followed by the referees in scrutinising the compliance plans submitted by the parties to find a point of relative convergence resonates with Fletcher's bee hive analogy for explaining Polanyi's proposal for resolving polycentric problems:

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[209] ibid.

[210] ibid.

[211] ibid 26–27.

[212] ibid 16.

> Polanyi argued that the best method of solving a polycentric task is mutual spontaneous adjustment by the constituent parts of the problem itself—rather like bees in a hive finding their appropriate space and function by their sense of the bees around them, with each bee individually adjusting to its neighbours, and each neighbouring bee in turn adjusting to the others' adjustment until a stable equilibrium is reached. In order to mimic this behaviour and to approximate the solution it would achieve, a governmental decisionmaker must employ discretion.[213]

Applying this to the judicial context, Fletcher argues that 'soliciting remedial plans from the parties is closely analogous to the spontaneous solution of Polanyi's paradigm' because the court encourages the parties to reach consensus, or at least greater convergence, on the best remedy.[214]

The process followed during the referees' hearing illustrates this spontaneous mutual adjustment well. The referees received compliance plans from four major stakeholders—the plaintiffs, the State, the City and the Regents—and benefited from a range of witnesses and *amici curiae*. The costing-out studies in turn drew on input from a much wider set of stakeholders. Indeed, the professional judgment method used in the plaintiffs' costing-out study is itself an example of Polanyi's 'mutual spontaneous adjustment',[215] with its iterative process of synthesis, revision and reconsideration involving broad and meaningful stakeholder participation. The use of costing-out studies meant that all constituent parts of the problem were involved in some way in reaching a solution. When faced with the conflicting costing-out results presented by the various parties in their compliance plans, the referees exercised their discretion to scrutinise the methodologies followed with a view to finding a point of convergence between them:

> This relative convergence of costing-out results derived from three different methods—the successful schools district method used in the State's costing-out analysis, the professional judgment method used in the plaintiffs' costing-out analysis, and the City's detailed planning method—provides comfort that our $5.63 billion costing-out recommendation to the Court is indeed sound.[216]

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[213] Fletcher (n 22) 647. See discussion in Chapter Two, Section II.A.

[214] ibid 653.

[215] ibid 647.

[216] Referees' Report (n 180) 16.

This approach resonates with Polanyi's idea of mutual spontaneous adjustment as a way of resolving polycentric problems, albeit with the distorting effect of the referees' imposed adjustment of the State's costing-out study. However, this discretion to scrutinise and adjust the State's costing-out study was necessary for optimising Effective Relief, as it ensured there was no gap between the constitutional standard of a 'sound basic education' and the operating costs required to provide it.

(d) An expanded mandate?

In assessing whether the State had complied with the directive to ascertain the cost of a 'sound basic education', the referees not only rejected the State's costing-out study as flawed but went further in recommending a specific amount that would be required to adequately fund public schools in New York City. This further recommendation falls comfortably within the expanded mandate as set out by the referees in their Report, but arguably lies outside the scope of the referees' mandate as framed in the trial court's Order of Reference. However, short of deferring to the State's costing-out result without any scrutiny of its method, there is little practical difference between the question of *whether* the State has ascertained the cost of a 'sound basic education' and the question of *how* the cost of a 'sound basic education' should be ascertained. Put differently, an assessment of the State's compliance is, in practical terms, inseparable from an assessment of what compliance would require. It is therefore easy to see how this expanded mandate led the referees to further insist that 'any effort to ensure New York City students the opportunity for a sound basic education must, of necessity, address the glaring inadequacy of the New York City District's facilities'. The costing-out exercise therefore covered both operational costs and facilities funding. Since the State did not submit a compliance plan for facilities funding, the referees adopted the detailed plan presented by the plaintiffs called the Building Requires Immediate Capital for Kids (BRICKS) program, which set out capital improvement projects worth $9.179 billion to be completed over a 5-year period.[217] This inclusion of facilities funding is justified by the referees as satisfying their 'addition[al]' mandate to 'address how the measures taken by the defendants will ensure improved "inputs such as teacher quality, school facilities and classrooms and the instrumentalities of learning"'.[218]

2. Scheduling Systemic Reform

While it was common cause that the State had failed to implement systemic reforms to the education financing system, the referees nevertheless made recommendations to the trial court as to how the State should be directed to comply with the Court of Appeals' second directive. These recommendations dealt with the programmatic implementation of systemic reform and a timetable for future costing-out studies to ensure continued compliance. The referees justified their remedial decision-making with reference to five overarching 'considerations' which I will draw on in my evaluation below as they resonate with my Remedial Principles.[219]

(a) The programmatic implementation of systemic reform

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[217] ibid 35.

[218] ibid 7.

[219] ibid 38–39.

The referees recommended a schedule for the programmatic implementation of systemic reforms required to bring the State's education financing system into constitutional compliance. First, the additional $5.63 billion in operational funding needed to provide a 'sound basic education' had to be phased in over a four-year period.[220] Second, a minimum of $9.179 billion required under the BRICKS capital funding plan had to be phased in over a five-year period.[221] This schedule for programmatic implementation reflects the tension between two 'considerations' that the referees were mindful of when advancing their recommendations. On the one hand, they were guided by the pragmatic consideration that 'it would do no good to recommend a plan that would deliver financial resources sooner than those charged with utilizing those resources wisely and frugally are prepared to do so'.[222] Rather than requiring immediate implementation of the full amount, therefore, the gradual phasing-in of the additional funding demonstrates sensitivity to the practical constraints within which the legislature and executive operated. On the other hand, the referees sought to give effect to the consideration that 'strong incentives must be built-in to any reforms to overcome political legislative inertia'.[223] To achieve this, the gradual phase-in mechanism was counterbalanced by the strict schedule of year-by-year incremental increases that were required to fully implement the structural reforms. This optimised Institutional Responsiveness by setting specific, detailed targets for compliance to ensure legislative inertia would no longer stymie reform efforts.

[220] ibid 4.

[221] ibid 5.

[222] ibid 38.

[223] ibid 39.

(b) The methodology and timetable for future costing-out studies

To ensure continued constitutional compliance, the referees made two further recommendations. First, the State should undertake a costing-out study every four years to determine annual operational costs,[224] using the methodology refined by the referees in their Report. Second, the State should undertake a facilities study every five years to determine capital improvement needs, following the BRICKS methodology.[225] This prescription regarding methodology reflected the consideration articulated by the referees that any costing-out of funding levels 'must be transparent, straightforward and reliable in its implementation'.[226] The soundness of the recommended costing-out methods optimises Effective Relief by ensuring 'there is no gap between the funding necessary to provide every student the opportunity for a sound basic education and the amounts actually being spent.'[227] The emphasis on transparency demonstrates Institutional Responsiveness by addressing the skewed political incentives causing the legislative inertia which prevents reform of the complex, opaque funding formulas.

These coercive stipulations regarding the timetable and methodology for future costing-out studies were offset by a more reflexive recommendation aimed at inducing compliance. This was the qualification that the quadrennial costing-out studies and quinquennial facilities studies would not need to be repeated indefinitely, but only until they achieve their purpose of bringing the education financing system into constitutional compliance:

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[224] ibid. Citing evidence from the record, the referees note that, '[t]he State apparently supports the concept of conducting a new costing-out study in four years'. ibid 39 fn 67.

[225] ibid 40.

[226] ibid 38.

[227] ibid 5.

> These operations and capital improvement funding studies should continue into the future until such time as reforms to the State's education finance formulas have rendered such studies no longer necessary to assure all New York City students receive the opportunity for a sound basic education.[228]

This recommendation proposes an excellent remedial mechanism for optimising both Effective Relief and Institutional Responsiveness. It insists on Effective Relief by requiring the costing-out studies to be repeated until it is clear that 'reforms to the State's education finance formulas have rendered such studies no longer necessary to assure all New York City students the opportunity for a sound basic education.[229] At the same time, it provides a strong incentive for the State to bring the funding system into constitutional compliance as quickly as possible to avoid resource-intensive costing-out exercises in the future. This optimises Institutional Responsiveness as represented by the referees' consideration that 'strong incentives must be built-in to any reforms to overcome political legislative inertia'.[230]

3. Enhancing Accountability

The referees' final recommendation concerned the Court of Appeals' directive to ensure a system of accountability for measuring whether the reforms actually provide the opportunity for a sound basic education. The Regents' description of the current accountability system as 'comprehensive, rigorous' and 'robust' suggested the existing state and federal mechanisms were functioning well.[231] At the same time, the City cautioned that further intervention by the Court could be counter-productive:

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[228] ibid 6.

[229] ibid 39.

[230] ibid.

[231] ibid 44.

> [F]urther direction from the court on how the City should run its schools, no matter how well intentioned, will inevitably make the Herculean task of operating the school system more complicated and deprive the School Chancellor of the flexibility and nimbleness he needs to manage the schools effectively.[232]

Convinced that an overhaul of the current accountability system would be both unnecessary and counter-productive, the referees instead only recommended minor enhancements that were essentially agreed upon by the parties.[233]

C. CFE IIIb: A Foothold for Legislative Defiance

The State appealed against DeGrasse J's confirmation of the Report in terms of which the referees' recommendations were made an order of the court. As evaluated above, these recommendations contained clearly framed directives mandating the programmatic implementation of systemic reform within a strict schedule. Taking issue with the specificity and prescriptiveness of these recommendations, the Appellate Division vacated the trial court's confirmation of the Referees' Report. Without engaging in a detailed analysis of *CFE IIb*, I will highlight the strategic relevance of the Appellate Division's decision for introducing uncertainty into what is required for the State to comply with its positive constitutional duties.

Writing for the majority, Buckley PJ held that the Court could enforce the State's positive duties by mandating plans and programmes that necessarily require the expenditure of funds, but its authority did not extend to dictating the specifics of their implementation or operation.[234] The precise contours of such plans and programmes, including budgetary determinations, were considered to be policy decisions to be made at

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[232] ibid.

[233] ibid 47–48.

[234] *Campaign for Fiscal Equity, Inc v State of New York* 29 AD3d 175 (2006) 186.

the discretion of the Governor and legislature.[235] He therefore held that the trial court had exceeded its authority in confirming the referees' dollar-specific recommendations, arguing that by 'calling for periodic, judicially supervised reviews of the amount of education funding, the dissent implicitly acknowledges that ascertaining the cost of the constitutionally mandated education is not susceptible to mathematical certitude, but rather depends, to a significant extent, on estimates'.[236] The trial court's order was therefore modified by directing the State to enact a budget within 'the range of constitutionally required funding' between $4.7 billion or $5.63 billion, to be phased in over four years.[237]

Saxe J's dissent criticises the majority's order for lacking the specificity that is needed to overcome the 'legislative paralysis' which underlies the State's non-compliance.[238] He expresses concern that the flexibility of the order provides a foothold for legislative defiance:

> I am unable to read the majority's decretal paragraph as containing the type of clear and exact directive that, if ignored, may be the subject of enforcement proceedings. Without that type of clarity, it merely amounts to a suggestion to consider taking action, an illusory and possibly unenforceable remedy.[239]

By providing a range of constitutionally appropriate funding levels, the majority assumes that the legislature and the Governor will be able to reach agreement on a specific budgetary figure.[240] As Saxe J points out, this assumption lacks Institutional Responsiveness to the legislature's demonstrated 'unwillingness or inability' to reform the

235 ibid.

236 ibid 177.

237 ibid 191.

238 ibid 201.

239 ibid 193.

240 ibid 193.

education financing system in spite of the fact that 'even defendants' brief acknowledges that the political branches remain "badly divided"'.[241] Whereas the majority held the trial court had overstepped the proper bounds of the judicial role, Saxe J insisted that 'to preclude a specific court directive to the Legislature on the grounds of separation of powers is to virtually preclude enforcement of the Court of Appeals' decision in *CFE II*.'[242] The dissent therefore correctly discerns the danger of indulging continued non-compliance by handing down an order that is not calibrated to the legislative inertia which has so far undermined reform efforts. Without providing greater clarity in its remedial order, Saxe J warned that the Court is allowing 'a festering constitutional problem of enormous dimension to continue indefinitely'.[243]

D. The Stand-Off: Who Will Blink First?

Sharing many of the concerns articulated by Saxe J in his dissent, the plaintiffs appealed against the decision handed down in *CFE IIIb*. In their appeal letter, the plaintiffs neatly captured the dispute that divided the Appellate Division and was now being posed to the Court of Appeals: 'Do the courts of this State have the power to order the Legislature and the Executive to redress a constitutional harm by taking actions that require the expenditure of a specific amount of public funds?'[244] The plaintiffs alleged that the political impasse between the Governor and the legislature could not be broken without

241 ibid 197-198.

242 ibid 198.

243 ibid 192.

244 Campaign for Fiscal Equity, 'Campaign for Fiscal Equity Appeal Letter to Defendants-Appellants' (18 April 2006) 2 <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 11 June 2018.

the Court mandating a specific remedy that left no room for negotiation.[245] Referencing statements by the Senate Majority Leader and the Speaker of the Assembly, the plaintiffs lamented that 'the public record makes clear that the State's political leaders are waiting for this Court's remedial order before acting on operating aid. The leaders of both legislative houses have said that it is up to the Court to tell them how much is to be spent.' [246] Characterising the State's non-compliance as an 'extraordinary and unprecedented circumstance of a continuing, direct defiance',[247] the plaintiffs argued that this intransigence jeopardizes the 'integrity of the entire judicial process' and 'substantially undermines the rule of law and public respect for court orders'.[248] The plaintiffs underscored the court's responsibility to ensure compliance with court orders and therefore requested a clear and prompt mandate in keeping with the referees' recommendations.

The State, by contrast, claimed that there was no need for a prescriptive order but merely a simple declaratory order as to the adequacy of its $1.93 billion costing-out study for additional operating expenses. Resisting the plaintiffs' characterisation of non-compliance as legislative defiance, the State instead paints a more flattering picture of its efforts:

> The two branches have neither defied nor neglected the requirements of the Education Article, but rather have struggled to reach consensus on all aspects of a plan to fulfil the state's obligations. A declaratory judgment as to the adequacy of the state defendant's plan for compliance will assist those branches to reach consensus, while respecting the principles underlying the separation of powers doctrine.[249]

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[245] ibid 1.

[246] ibid 3.

[247] ibid 9.

[248] ibid 10.

[249] Office of the Attorney General, 'Brief for Defendants-Respondents-Cross-Appellants', *Campaign for Fiscal Equity v State of New York* Index No 111070/93 (10 July 2006) 70–71 <http://finance.tc-library.org/ContentTypes.asp?cgi=5> accessed 10 June 2018.

By asserting the presence of political will to implement the required reforms, the State presents a simple declaratory nudge as a viable remedial option for ensuring compliance. In light of the evidence on the public record that the leaders of both legislative houses were intent on doing nothing until the Court mandates a specific budgetary figure, this claim that the State has been neither intransigent nor inattentive ('neither defied nor neglected') is a disingenuous appeal to judicial deference.

The defiant stance adopted by the legislature also speaks of the broader political backlash against the far-reaching recommendations confirmed by the trial court. A conference held by the Empire Center for New York State Policy on 'The Campaign for Fiscal Equity Case: Should the Legislature Ignore Justice DeGrasse?' vividly captures the prevailing discourse that emboldened legislative defiance after *CFE IIIa*. Speaking on the panel, David Schoenbrod explains that the Court of Appeals is a weak position for enforcing the trial court's order:

> The governor can submit a proposal, but he cannot spend the money without a state appropriation; only the legislature can appropriate the money. So the governor cannot be held in contempt if the spending does not rise to the level that Judge DeGrasse wants, and the legislators and the legislature cannot be made parties to the case because of legislative immunity. In other words, Judge DeGrasse and the Court of Appeals cannot enforce their order against the state legislators.[250]

Capitalising on this difficulty of compelling compliance with court orders, the State's approach in *CFE IIIc* places the legislature and Court in a stand-off: either the Court must mandate a specific budgetary figure based on the evidence on the record, or it must defer entirely to the legislature by issuing a declaratory order and terminating supervisory jurisdiction. Would the Court of Appeals hold their nerve or blink in the face of legislative defiance?

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[250] EJ McMahon and others, 'The Campaign for Fiscal Equity Case: Should the Legislature Ignore Justice DeGrasse?' (Empire Center for New York State Policy 2005) 5–6 <www.empirecenter.org/publications/the-campaign-for-fiscal-equity-case-should-the-legislature-ignore-justice-degrasse/> accessed 28 November 2018.

E. CFE IIIc: The Retreat into Deference

In *CFE IIIc*, we see a split in the court's commitment to ensuring compliance with its remedial orders. Bucking the trend set by *CFE Ic* and *CFE IIc*, it is the majority in *CFE IIIc* that retreats into deference to avoid provoking antagonism with the legislature. Pigott J, delivering the Opinion of the Court, found that the referees' expanded mandate did not accord due deference to the State's rationally defensible costing-out result of $1.93 billion. In her strong dissent, Kaye CJ argued that the State's costing-out estimate is not entitled to any special weight given the absence of any agreed state budget plan for implementing reforms and the irrationality of the costing-out methodology used. Having discounted the cost of a sound basic education, the Court of Appeals was easily pleased with the partial compliance achieved by the recently enacted capital improvement plan and improved accountability structures, and rejected the need for future costing-out studies or the retention of supervisory jurisdiction by the Court.

1. Responding to Non-Compliance: Deference or Intervention?

Pigott J held that the trial court erred in confirming the Referees' Report as their expanded mandate went beyond evaluating compliance to making recommendations that intruded on the government's policymaking domain.[251] He commended the Report as 'command[ing] our attention as well as our respect; it is likely that much of value may be learned from the Referees' careful consideration of methods of ascertaining the cost of a sound basic education and reforms to the current system of public school financing.'[252]

[251] *CFE IIIc* (n 2) 57.

[252] ibid 57.

His objection instead lay in the trial court giving the referees 'a mandate to make *recommendations* as between compliance proposals – the State's, the plaintiffs', the City's, the Regents'.[253] This speaks to the distinction between the mandate narrowly construed as an assessment of whether the State has complied, and an expanded mandate to make recommendations as to how the education financing system can be brought into constitutional compliance. Pigott J concluded that the 'Supreme Court erred by, in effect, commissioning a de novo review of the compliance question' rather than deferring to the State's costing-out result.[254]

Kaye CJ's dissent offered a strong defence of the trial court's initiative in resorting to a panel of referees, arguing that judicial intervention was needed to break the deadlock between the legislature and executive about the cost of a 'sound basic education'. She maintained that the deadline set by the Court in *CFE IIc* afforded the government sufficient time, opportunity and leeway to introduce the required reforms but that:

> Regrettably, our trust was misplaced. Today, more than three years later—and more than 13 years after this litigation began—defendants still have failed to fund the New York City public schools adequately. Having failed to satisfy their responsibility, defendants now compel this Court to determine the specific steps that must be taken to remedy the undisputed constitutional violation.[255]

Her sense of frustration with the government's counter-productive stand-off was palpable, observing that 'it is hard to see what alternative the court had'.[256] She argued that judicial intervention in the face of non-compliance is the logical progression, not an improper escalation, of the court's supervisory function. While Pigott J took issue with the scope of the referees' expanded mandate, Kaye CJ defended their recommendations as the result of 'appropriately resort[ing] to the tools of the judicial trade—testimony,

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253 ibid 59.

254 ibid 57.

255 ibid 62.

256 ibid 63.

evidence and fact-finding.'[257] Her robust and pragmatic reasoning clearly regards the judicial function as extending throughout the remedial process to ensure rights are not only vindicated in the courtroom but are also given concrete and tangible effect.

2. Discounting the Cost of a Sound Basic Education

In criticizing the referees' expanded mandate, Pigott J resorted to the familiar arguments of judicial deference in the context of budgeting and the allocation of scarce resources, tightly demarcating the court's role to 'protect rights, not to make policy'.[258] Pigott J held that the referees' scrutiny of the State's costing-out methodology was misplaced in requiring more than what was rationally defensible.[259] In contrast to the language of adequacy that animated the Court of Appeals' earlier judgments, Pigott J's opinion frequently uses weaker evaluative terms like 'rational',[260] 'rationally defensible',[261] 'minimally adequate'[262] and 'reasonable'[263] in emphasizing that the state's duty is merely to provide a 'constitutional minimum'.[264] Applying this high degree of deference to the State's costing-out study, Pigott J found its methodology was not so 'patently *irrational*' to justify judicial intervention in the state budget.[265] In defending the State's use of the 50

[257] ibid.

[258] ibid 58.

[259] ibid 57.

[260] ibid 57.

[261] ibid 59.

[262] ibid 61.

[263] ibid 59.

[264] ibid 57, 60.

[265] ibid 59 (emphasis in original).

per cent cost reduction filter (which, notably, is now referred to as a cost-*effectiveness* filter), Pigott J observes that '[t]he premise, and the conclusion, are no doubt debatable, but we cannot say they are irrational, and they are therefore entitled to deference from the courts'.[266] In a similarly defensive vein, he did not think the 1.35 weighting for poor-income students 'lacks grounding in prudent reason'.[267] Pigott J therefore concluded that the referees should have deferred to the State's $1.93 billion costing-out result.[268] By deferring to this heavily discounted cost of a 'sound basic education' in spite of the evidence on the record as to its flaws, *CFE IIIc* sanctions a gap between the level of funding required for providing an adequate education and the level of funding that will actually be allocated to schools.

Kaye CJ dissented in respect of the degree of deference owed to the government in response to their non-compliance as well as the rationality of the State's costing-out study.[269] She 'agree[d] wholeheartedly' with the majority that '[w]hen the Executive and the Legislature have acted together on matters within their particular province, the courts should indeed tread lightly' but she insisted that this 'substantial deference' is not owed when there is no such agreement between the political branches of government.[270] On the contrary, she argued that the absence of any agreed 'state budget plan for bringing the schools into constitutional compliance...is precisely the problem'.[271] Having exposed the majority's deference as being misdirected towards the State's estimate rather than any agreed plan for reform, she then raised concerns about the rationality of the State's

[266] ibid 60.

[267] ibid.

[268] ibid 57.

[269] ibid 62.

[270] ibid 62.

[271] ibid.

costing-out study. Pointing to the clear evidence on the record as to its flaws, she lamented that '[p]lainly, every governmental actor knew what the referees and the Appellate Division here concluded: A sound basic education will cost approximately $5 billion in additional annual expenditure.'[272]

3. Easily Pleased with Partial Compliance

While the Court of Appeals was split as to whether the State had complied with the directive to ascertain the cost of a 'sound basic education', it was easily pleased by the recent progress that had been made in other respects. Most positively, the legislature had passed legislation increasing the budget for capital expenditure such that the Court considered it unnecessary to make any further order in this regard.[273] In a less auspicious move, however, the Court did not mandate future costing-out studies to ensure continued compliance and, bringing an end to thirteen years of serialised litigation, it terminated its supervisory jurisdiction. While the majority were easily pleased by the State's partial compliance in respect of capital improvements and accountability, Kaye CJ's dissent concludes with fragile optimism that the State will seek to optimise its systemic reform of the education financing system: 'I remain hopeful that, despite the Court's ruling today, the policymakers will strive to make the schools not merely adequate, but excellent, and to implement a statewide solution.'[274]

[272] ibid 67.

[273] ibid 61.

[274] ibid 67.

VI. Postscript: *NYSER* Compliance Litigation

Following *CFE IIIc*, the state legislature enacted the Budget and Reform Act of 2007 which set in motion far-reaching reforms to the education financing system in New York. These reforms included sizeable budgetary commitments through a funding increase of $5.4 billion to schools in New York City and $4 billion towards schools in the rest of the state, as well as a 'Contract for Excellence' to ensure accountability in directing expenditure towards deficiencies in the education system.[275] These reforms were mostly rolled out as required during the first half of the four-year timetable for the phase-in, but they were then abandoned in the aftermath of the 2008 financial crisis. At first, education funding levels were merely frozen but, as the recession deepened, state-wide funding was dramatically cut and has never recovered to the levels envisaged by the Budget and Reform Act.[276]

In February 2014, the educational advocacy group New Yorkers for Students' Educational Rights (NYSER) filed a lawsuit alleging that the State and Governor of New York had neglected their constitutional duty to provide a sound basic education to all children at all times—a duty which is not contingent on economic prosperity.[277] The June 2017 judgment from the Court of Appeals has yielded mixed results for this first stage of the *NYSER* case.[278] On the one hand, the impact of the judicial retreat in *CFE IIIc* is clear to see from the dismissal of the plaintiffs' first two causes of action. The Court of

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[275] S 2107 of Budget and Reform Act of 2007 (codified at Education Law s 3602) (NY 2007).

[276] See Stephanie D Ashley, 'New York's Persistent Denial of New York City Educational Rights: Ten Years After Campaign for Fiscal Equity v New York' (2017) 47 Seton Hall Law Review 1045.

[277] See generally, Rebell, 'Safeguarding the Right to a Sound Basic Education' (n 65).

[278] *NYSER* (n 5). The judgment of the Court of Appeals and related litigation materials are available at <www.nyser.org/litigation-papers/> accessed 28 November 2018.

Appeals refused to entertain NYSER's allegation that the state had failed to comply with the *CFE* rulings because it held that no injunctive relief survived the termination of litigation in *CFE IIIc*.[279] Similarly, the Court held that NYSER could not state a cause of action based on the failed implementation of the Budget and Reform Act or the budget cuts which followed the recession, as *CFE IIIc* had 'in no way imposed any further funding requirements on the State' and, indeed, had expressly rejected a directive requiring annual spending increases.[280] On the other hand, NYSER's other two causes of action met with success, albeit in the form of an amended claim focused on New York and Syracuse rather than an alleged state-wide failing to provide a meaningful opportunity for a sound basic education.[281]

Conclusion

The serialised CFE litigation offers both a vivid insight into the remedial challenges posed by positive duties and an array of innovative remedial mechanisms for overcoming them. The setting for the paradigm remedial puzzle was education financing reform, drawing the court into the highly polycentric task of translating the constitutional standard of a 'sound basic education' into a budgetary figure. The remedial tug of war between the various courts, and within the Court of Appeals itself, reveals a variety of responses to the remedial challenges of ascertaining the cost of a sound basic education. My contextualised evaluation explained these disagreements in terms of their differing prioritisations and optimisation of my remedial principles.

[279] ibid 14–15.

[280] ibid 15 (Wilson J).

[281] ibid 16–20.

The order in *CFE II* was a court-prompted remedy that prioritised Institutional Complementarity by entrusting the task of ascertaining systemic relief to the legislature. A comparison of the various judgments in *CFE IIa* and *CFE IIc* reveals that this prioritisation need not come at the expense of the other remedial principles. Effective Relief was optimised by setting clear constitutional parameters for reform to which the legislative task of 'cashing out' the standard of education adequacy was tethered. Maximal effect was given to the right to a sound basic education by requiring an accountability mechanism that would ensure reforms were actually meeting these constitutional standards. Systemic Compliance and Institutional Responsiveness were only optimised in DeGrasse J's order in *CFE IIa* and Smith J's proposed order in *CFE IIc*. Their recognition of the complexity and contingency of New York City's funding formulas on the state-wide financing system led to their optimisation of Systemic Compliance and Institutional Responsiveness as mutually reinforcing principles – the transparency required for achieving financing reform in New York City could only be achieved through a more comprehensive overhaul of state-wide reform.

As Degrasse J had warned in *CFE IIa* that continued deference was conditional on compliance, the shift to a court-imposed remedy in *CFE IIIa* was the natural escalation of the court's control over remedial formulation through the remedial process. The reasons underlying the state's non-compliance called for a re-allocation of constitutional labour between the court and the deadlocked branches of government. The appointment of an independent panel of referees was able to break this political bind by finding a point of relative convergence between the costing-out studies undertaken by the parties. The referees' scrutiny of the costing-out methods injected much-needed transparency into the budgeting process and ensured funding was tied to the constitutional standard of education adequacy. The requirement for periodic costing-out studies optimised Systemic Compliance by ensuring reforms would not be a once-off intervention but rather involve the constant recalibration needed to ensure full compliance. At the same time, this requirement enhanced Institutional Responsiveness through the incentive that future costing-out studies would only need to continue until Systemic Compliance had been achieved.

The Referees' Report in *CFE IIIa* therefore offers a compelling demonstration of how the exercise of discretionary remedial power can be optimised through costing-out studies. The disappointing retreat by the Court of Appeals in *CFE IIIc* does not detract from the potential of costing-out studies to overcome the paradigm remedial puzzle posed by positive duties. However, the extensive funding cuts and *NYSER* compliance litigation draw attention to how costly this retreat was, as the Court of Appeals' toleration of partial compliance in *CFE IIIc* left very little for the state to comply with. It is a sting in the tail of a long struggle for the still elusive promise of equal educational opportunity in New York City's public schools, but the CFE litigation nevertheless forged a pioneering path of remedial innovation for courts to follow in future.

CHAPTER SIX

LITIGATING A LEGACY OF EDUCATION INEQUALITY IN SOUTH AFRICA

[T]he ongoing violation of the right to basic education constitutes exceptional circumstances. It is time for a court to substitute its own plan of action for that of the Department. This is a case where the decision...should not be left to the designated functionary.[1]

Introduction

This chapter presents a case study of the innovative remedial mechanisms featured in three streams of education litigation run by the Legal Resources Centre (LRC) in the Eastern Cape, South Africa. Each stream of litigation challenges a systemic failure by the Department of Education[2] to provide adequate infrastructure or basic resources to schools: the *Mud Schools* case concerns unsafe school infrastructure;[3] *Madzodzo* concerns the shortage of school furniture;[4] and the twin cases of *Centre for Child Law* and *Linkside* concern the appointment and payment of teachers.[5] Each case charts a similar remedial trajectory: litigation begins with a settlement agreement between the LRC and the Department; it progresses with further court-approved remedial plans that become increasingly detailed and prescriptive in response to the remedial challenges that emerge

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[1] *Linkside and Others v Minister for Basic Education and Others* [2015] ZAECGHC 36 [26] (Roberson J).

[2] I use the general term 'Department of Education' (and simply 'Department' in its abbreviated form) in this chapter to refer to both the national Department of Basic Education (DBE) and the Eastern Cape Department of Education (ECDOE), unless the distinction between the two levels of governance is important to the particular context for my argument.

[3] *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* (ECB) unreported case no 504/10. For ease of reference, I call this litigation the '*Mud Schools*' case as it is most commonly known by this name.

[4] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

[5] *Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG); *Linkside and Others v Minister for Basic Education and Others* [2015] ZAECGHC 36.

during the implementation process; and it culminates in remedial innovation as non-compliance persists. With the exception of the *Mud Schools* case, this culmination takes the form of a sharp judicial rebuke and well-reasoned remedial decision that brings a sharper edge to accountability for compliance than the previous court-approved remedies. While each stream of litigation follows a similar storyline of serial settlement and serial non-compliance, my contextualised evaluation also traces the narrative arc of the three streams of litigation viewed as one longer story of remedial development. *Mud Schools* piloted a two-track remedy that was refined in *Madzodzo* through auditing and reporting mechanisms, and ultimately inspired the truly bold innovations in *Centre for Child Law* and *Linkside*.

The case study is structured to foreground the way that these three streams of litigation together chart a steep learning curve in remedial experimentation, refinement and innovation. Section I situates the LRC litigation within its broader context, emphasising how South Africa's transformative constitutional vision of equal educational opportunity is constrained by a legacy of deep structural inequality which manifests in a public education system that is starkly divided by poverty and privilege. Section II provides an overview of the three streams of LRC litigation, setting out in further detail the serialised structure of the cases and the central role that settlement played in remedial development and innovation. Turning to the heart of the case study, Sections III-V evaluate the remedial mechanisms featured in the three streams of litigation. My sequential treatment of the cases maps onto the progression of the remedial process: the *Mud Schools* case addresses the challenges of ascertaining systemic relief (Section III); *Madzodzo* contributed the refinement of reporting and monitoring requirements to promote accountability for compliance (Section IV); and finally, *Centre for Child Law* and *Linkside* respond to persistent non-compliance with truly resourceful remedial innovations that compel compliance (Section V). My conclusion charts these individual contributions as one longer trajectory of remedial development, affirming their potential for optimisation but also underscoring their genesis as court-approved remedies in the compromised context of persistent non-compliance.

I. Situating the LRC Litigation: A Transformative Vision Constrained by a Legacy of Education Inequality

A. The Bleak Background of Education Inequality

The LRC litigation covered in this case study grapples with the systemic challenges that lie at the heart of South Africa's legacy of education inequality. These inequalities are rooted in South Africa's long history of colonialism, but the institutionalised racism of apartheid systemically deprived black children of educational opportunities in a way that directly mirrors the current structural inequalities in the education system. The ideological thrust of the Bantu Education Act 47 of 1953 was not simply that education for blacks should be separate but, crucially, that it should also be inferior in quality. This is notoriously captured by Hendrik Verwoerd's speech to Parliament in 1953:

> Native education should be controlled in such a way that it should be in accord with the policy of the State…If the native in South Africa today in any kind of school in existence is being taught to expect that he will live his adult life under a policy of equal rights, he is making a big mistake…There is no place for him in the European community above the level of certain forms of labour.[6]

Rather than serving as an empowerment or enabling right that enhances the enjoyment of other human rights, education became the oppressive tool by which the apartheid regime controlled the life prospects of generations of black South Africans.

[6] Quoted in *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) [121] (O'Regan J).

The distribution of state resources during apartheid reflected this ideology of separate and inferior education for blacks. White schools received generous funding and infrastructural support while black schools were systematically denied basic resources, from toilets and desks to textbooks and teachers.[7] As late as 1986, during the height of the State of Emergency, per pupil spending in white schools was nine times that in the worst off black schools.[8] This disparity in education financing was aggravated by the fact that black schools were located in the rural homelands (or 'Bantustans'), which were created by the apartheid government to further their policy of separate development, and therefore lacked the basic infrastructure and social services that the state provided to areas designated for whites.[9] The Transkei and Ciskei were two such homelands, now part of the Eastern Cape province, and the systemic neglect of schools in these deep rural areas during apartheid has left immense challenges for the Eastern Cape Department of Education (ECDOE), as evidenced by this case study.

B. The Transformative Vision of the Right to Education

Since the country's first democratic elections in 1994, the South African government has worked to transform the starkly segregated, highly inequitable education system it inherited. A central aim of legislative and policy reform has been the achievement of a more equitable distribution of resources, with particular attention given to improving the

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[7] Edward B Fiske and Helen F Ladd, *Elusive Equity: Education Reform in Post-Apartheid South Africa* (BIP 2004) 55.

[8] 'Education For All – 2005 Country Status Report: South Africa' (Department of Education 2005) 1 <www.dhet.gov.za/SitePages/Reports.aspx> accessed 30 November 2018.

[9] Craig Paxton, 'Possibilities and Constraints for Improvement in Rural South African Schools' (DPhil thesis, University of Cape Town 2015) 6.

educational prospects of previously disadvantaged children.[10] The roots of this transformative mandate lie in the right to education as entrenched in section 29(1) of the Constitution:[11]

> (1) Everyone has the right—
> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Two features of section 29(1) are particularly noteworthy for situating the LRC litigation within the South African constitutional context. Firstly, the right to basic education is an *immediately realisable* right,[12] in contrast to other socio-economic rights incorporated into the Constitution that are progressively realisable.[13] The rights to housing, health care, food, water and social security qualify the state's positive duties in the following terms: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.[14] The state's positive duty to provide basic education is not analogously limited, thereby establishing the centrality of education to the Constitution's transformative vision.[15] Having been a locus of injustice and oppression during apartheid, education is now a key vehicle for overcoming the legacy of structural inequality. This transformative potential lies in the fact that education is an enabling or multiplier right that enhances the enjoyment of other human

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[10] 'Education For All – 2005 Country Status Report: South Africa' (n 8) 1.

[11] Constitution of the Republic of South Africa, 1996.

[12] *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) [37] (Nkabinde J).

[13] Most prominent in this regard are the right to have access to adequate housing (s 26(1)) and the right to have access to health care services, sufficient food and water, and social security (s 27(1)). It is important to note, however, that basic education is not the only immediately realisable socio-economic right: the rights of children enumerated in s 28(1), which include basic nutrition, shelter, basic health care services and social services, are not subject to progressive realisation.

[14] Constitution, ss 26(2) and 27(2).

[15] Transformative constitutionalism is defined by Karl Klare as a 'long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'. See Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146, 150.

rights and so forms the basis of an empowered and meaningful life.[16] The unqualified nature of the right in being immediately realisable is therefore a recognition of the vital role that education plays within South Africa's vision of transformative constitutionalism.

The second noteworthy, but rather more controversial, feature of section 29(1) is that it does not specify a right to *free* basic education, in contrast to the more common guarantee of free and compulsory education found in regional and international human rights documents.[17] Section 21 of the South African Schools Act 84 of 1996 allows School Governing Bodies (SGBs) to supplement their resources by charging school fees.[18] The rationale underlying this approach was to facilitate the cross-subsidisation of poor learners through fees paid by wealthier parents, but in effect it has exacerbated education inequality in respect of both access and quality.[19] In an attempt to address this counter-productive trend, the government introduced an exemption policy as a redistributive mechanism to enable children from poor households to access fee-paying schools.[20] Parents who are unable to pay school fees are exempt from any fee liability, and it is illegal for a child to be refused admission to a fee-paying school on this ground.[21] However, exemptions for individual learners have done little to change the

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16 CESCR, 'General Comment No.13: The Right to Education' (1999) E/C.12/1999/10 [1].

17 Art 26 of the Universal Declaration of Human Rights; Art 13 of the International Covenant on Economic, Social and Cultural Rights; Art 28 of the UN Convention on the Rights of the Child; Art 11 of the African Charter on the Rights and Welfare of the Child.

18 On the constitutionality of charging school fees in South Africa, see generally Stu Woolman and Brahm Fleisch, *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (PULP 2009) 213–240.

19 'Report to the Minister: A Review of the Financing, Resourcing and Costs of Education in Public Schools' (Department of Education 2003) 69 <https://www.gov.za/sites/default/files/educationfund_1.pdf> accessed 30 November 2018; Woolman and Fleisch (n 18) 215–216; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 217–218.

20 'Report to the Minister: A Review of the Financing, Resourcing and Costs of Education in Public Schools' (n 19) 79.

21 South African Schools Act 84 of 1996, ss 5, 39, 40. But note that there is some concern about how transparently fee-charging schools determine whether to admit poorer students and approve fee

structural inequalities in the education system. As the Minister of Education later reflected, '[i]ronically, given the emphasis on redress and equity, the funding provisions of the [South African Schools] Act appear to have worked thus far to the advantage of public schools patronised by middle-class and wealthy parents.'[22] It became clear that a more significant policy intervention was needed to overcome the funding inequities in the education system.

C. The Persistent Reality of Poverty and Privilege

In 2006, the National Norms and Standards for School Funding (NNSSF) introduced more proactive redistributive measures to compensate poorer schools for the revenue they do not collect through school fees. Under this no-fee policy, schools that charged fees would receive the least funding from the state, while no-fee schools would receive greater state subsidies. In 2009, schools ranked in the lowest three quintiles (based on the income levels and wealth of the local community) were declared no-fee schools, meaning that these schools were prohibited from charging school fees although they could accept voluntary donations. The strong redistributive orientation of the policy is reflected in its target that 60 per cent of available resources for non-personnel expenditure should be allocated to the poorest 40 per cent of learners.[23] The sheer reach of the reform is clear from the huge rise in the number of learners not paying school fees as a result of the

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exemptions: ibid 94–96; Daniel McLaren, 'Funding Basic Education' in Faranaaz Veriava, Anso Thom and Tim Fish Hodgson (eds), *Basic Education Rights Handbook: Education Rights in South Africa* (Section27 2017) 68 <www.section27.org.za/section-27-publications/> accessed 3 December 2018.

[22] General Notice 2362 *GG* 19347 of 12 October 1998 [46] (Amended NNSSF).

[23] Raj Mestry, 'A Critical Analysis of the National Norms and Standards for School Funding Policy: Implications for Social Justice and Equity in South Africa' (2014) 42 Educational Management Administration and Leadership 851, 856.

NNSSF no-fee policy: from only 2.8 per cent in 2006 to 66 per cent in 2017, with the provincial numbers in the Eastern Cape even higher at 81.5 per cent.[24]

This explicitly pro-poor policy to education financing has had broadly redistributive effects, with the poorest schools benefitting significantly from the increased state allocations.[25] However, there are still significant constraints which have held back progress towards achieving equity in education funding. One concerning trend especially relevant to this case study is the consistent under-spending by Provincial Departments of Education (PEDs) that serve a high concentration of no-fee schools. The national Department of Basic Education (DBE) sets a 'no-fee threshold' each year which is the minimum per-pupil amount no-fee schools are entitled to receive.[26] This serves as an 'adequacy benchmark' to identify the minimum amount for non-personnel costs required to realise a learner's right to basic education.[27] However, the DBE's 2011 School Monitoring Survey revealed that 53 per cent of learners across the country were in schools not meeting these minimum funding levels and, in spite of receiving the highest state subsidies, no-fee schools fared the worst.[28] Under-spending was particularly acute in the Eastern Cape, with a mere 15 per cent of learners in the province being funded at the minimum level or higher.[29] These figures show that the additional funding

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[24] 'General Household Survey 2017' (StatsSA 2017) 14 <http://www.statssa.gov.za> accessed 3 December 2018. See further 'General Household Survey: Focus on Schooling 2016' (Department of Basic Education 2018) 34–35 <www.education.gov.za/Resources/Reports.aspx> accessed 3 December 2018.

[25] Russell Wildeman, *Reviewing Eight Years of the Implementation of the School Funding Norms, 2000-2008* (Institute for Democracy in Africa 2008).

[26] The 2018 no fee threshold is R1,316 per student in quintiles 1, 2 and 3. GN 75 *GG* 41420 of 2 February 2018.

[27] Mestry (n 23) 856.

[28] 'Report on the National School Monitoring Survey (DBE013, Conducted in 2011)' (Department of Basic Education 2013) 161–162 <www.education.gov.za/Resources/Reports.aspx> accessed 3 December 2018.

[29] ibid 163.

provided under the no-fee policy is not being spent efficiently by PEDs so as to reach the schools who need it most.[30]

Besides this challenge of under-spending by PEDs, there are further reasons why the NNSSF have not managed to overcome the structural inequalities in the education system in spite of its redistributive efforts. No-fee schools are burdened by an infrastructure backlog caused by decades of deliberate under-investment in black schools during apartheid, while former 'Model-C'[31] schools have inherited high-quality facilities and equipment. There are vast discrepancies in the quality and capacity of teaching staff at no-fee schools compared with top quintile, former Model-C schools that use revenue from school fees to employ a greater number of high quality teachers and non-educator staff. Moreover, these inequalities in inputs have generated even greater discrepancies in educational outputs. International tests consistently place South African schools among the worst performers in literacy and numeracy in southern and eastern Africa, but it is the 'bimodality of student performance' between poor, historically disadvantaged schools and former Model-C, fee-charging schools that is most striking.[32] In short, the no-fee policy has not changed the fact that the quality of education provided in South African public schools still closely tracks the fee-paying ability of its parent body.[33] The Minister of Basic Education conceded in her 2017/2018 Annual Report that:

> Despite South Africa's globally recognized, progressive and equitable policies on school funding, broader societal poverty and inequalities persist, and these have an effect on learner performance. The painful and unequal history of our country is not proving easy to transform quickly.[34]

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[30] ibid 162.

[31] Model-C schools were whites-only government schools during apartheid.

[32] Nicholas Spaull, 'Poverty and Privilege: Primary School Inequality in South Africa' (2013) 33 International Journal of Educational Development 436, 437–438.

[33] Fredman (n 19) 218.

[34] 'Annual Report 2017/2018' (Department of Basic Education 2018) 9 <www.dhet.gov.za/SitePages/Reports.aspx> accessed 30 November 2018.

D. The Jurisprudential Distraction of a Procedural Power Struggle

The powerful role of SGBs has hindered efforts to redress the structural inequalities between privileged, former white schools and poor, historically disadvantaged schools. As Fiske and Ladd explain in their seminal book, *Elusive Equity: Education Reform in Post-Apartheid South Africa,* a key aspect of the negotiated settlement at the end of apartheid was the significant control that schools maintained through locally elected SGBs.[35] This was appealing across the racial divide: black South Africans were naturally eager for local communities to gain ownership of schools given their distrust of state-controlled schools as instruments of oppression, while whites at Model-C schools saw self-governance as a means to protect their privilege. Fiske and Ladd point out concerning this concession that:

> The political trade-off involved in this move was momentous. It gave Model C schools the power to set their own policy on admissions (albeit subject to a number of limitations, including no racial discrimination), school language, the hiring of teachers, and obligatory school fees. While former black schools also gained those powers, they were much less well equipped to use them in ways to enhance school quality.[36]

The result has been that former Model-C schools have used their self-governance to preserve their privilege, having both the fee income and the social capital to provide high quality education, while poorer schools are left floundering without either kind of resource to improve the quality of education they provide. As Fiske and Ladd demonstrate in their study, these 'differences in social and managerial capital in the various types of schools directly affects the country's efforts to promote a non-racial and equitable education system.'[37]

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[35] Fiske and Ladd (n 7) 69.

[36] ibid.

[37] ibid.

The tension at fee-paying schools between the freedom to charge school fees and the duty to grant exemptions is one manifestation of the power struggle that has ensued between well-resourced SGBs desiring to retain independence and the Department of Education seeking to implement their transformative policies across the education system. A large part of the emerging Constitutional Court jurisprudence on education has been side-tracked by this power struggle between SGBs and the Department of Education. Rather than focusing on the normative content of the right to education, much of this litigation has concerned procedural fairness where well-resourced schools have vigorously defended their independence against what they regard as the Department's heavy-handed interventions.[38] Key cases have involved the contestation of decisions by schools to refuse admission to learners on the basis of alleged capacity constraints[39] or their language policy,[40] or to exclude learners on the basis of a pregnancy policy.[41] The Court has mainly found in favour of the SGBs in these cases, holding that the Department failed to act in a procedurally fair manner.[42] Owing to the procedural framing of these cases, however, the courts have not had to engage squarely with the

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[38] See the exchange between Sandra Fredman and Yana van Leeve on the Constitutional Court's reliance on procedure in adjudicating the right to education in several recent cases: Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2016) 6 Constitutional Court Review 165; Yana Van Leeve, 'Executive Heavy Handedness and the Right to Basic Education: A Reply to Sandra Fredman' (2016) 6 Constitutional Court Review 199.

[39] *MEC for Education, Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC).

[40] *HOD, Mpumalanga Department of Education v Hoërskool Ermelo* (2010) 2 SA 415 (CC).

[41] *HOD, Department of Education, Free State Province v Welkom High School; HOD, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC).

[42] The most recent case in this procedural power struggle marks a welcome break to the trend of defeats suffered by the Department of Education: *Federation of Governing Bodies for South African Schools v MEC for Education, Gauteng* 2016 (4) SA 546 (CC). Although the case turned on procedural questions, it is worth noting that the amicus Equal Education did mount a substantive challenge against the constitutionality of default feeder zones on the ground that they risk perpetuating school admission along racial lines owing to the lingering presence of apartheid geography. Moseneke DCJ acknowledged the merit in this argument, but conveniently side-stepped the issue: 'There is traction in the contention of the amicus. But I am uncertain that an amicus could introduce a new cause of action—unfair discrimination—and press for a remedy that none of the parties has sought. Happily I do not have to decide the issue because the order we will make will compel the MEC to formulate fresh rules for feeder zones as required by regulation 4(1).' ibid [39].

more substantive issues underlying these disputes. They have tended to restrict themselves to the narrow questions of procedural fairness raised by the parties rather than expanding their enquiry to consider the normative implications of the policies in dispute. This power struggle and the ensuing procedural disputes between SGBs and the Department of Education have been a distraction from the transformative vision of realising the right to education for all children in South Africa.

The education litigation undertaken by the LRC in the Eastern Cape High Court has followed a fundamentally different path. In contrast to the line of cases in which SGBs have arguably used litigation strategically to protect their privilege in the form of both financial and social capital, the LRC has sought to leverage the courts to improve the particularly bleak prospects faced by poor black children in the Eastern Cape. Squarely focused on the normative commitment embodied by the right to education, the LRC has attempted to address the backlog of infrastructure and absence of basic resources at some of the poorest schools in the Eastern Cape and indeed the whole of South Africa. The issues they have tackled include the elimination of mud schools, the setting of norms and standards for school infrastructure, the provision of basic furniture such as desks and chairs, the supply of textbooks and other learner-teacher support materials, the appointment and payment of teachers, scholar transport, and the provision of sanitation facilities.[43] The LRC litigation therefore strikes at the heart of structural inequality in the education system, strategically targeting those substantive aspects that constrain the transformative potential of education.

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[43] For an overview of the LRC's education litigation, see *Ready to Learn? A Legal Resource for Realising the Right to Education* (Legal Resources Centre 2013); *Fighting to Learn...A Legal Resource for Realising the Right to Education* (Legal Resources Centre 2015). While the LRC has played a key role in strategic litigation on education, it is important to note the complementary, and often collaborative, efforts of other public interest organisations such as Equal Education and Section27.

E. The Debilitating Effects of Institutional Dysfunction

This case study reveals that insufficient progress has been made in addressing the backlog of infrastructure and resources in many schools in the Eastern Cape, with basic facilities from toilets and desks to textbooks and qualified teachers still being in short supply. Without downplaying the enormity of the systemic challenges in the Eastern Cape, the debilitating effects of institutional dysfunction in the ECDOE have thwarted efforts to provide basic educational resources to schools. Two root causes of this institutional dysfunction that are particularly relevant to this case study are the lack and capacity and lack of accountability in the ECDOE.[44]

Firstly, the weak institutional functionality of the ECDOE engenders an institutional inertia that makes the implementation of systemic reform in education a most difficult task. Under the scheme of co-operative governance set out in the Constitution, the national DBE may set uniform norms and standards, frameworks and national policies for education,[45] but primary responsibility for the provision of education falls to the provinces.[46] This primary responsibility includes the crucial tasks of budgeting and planning for school infrastructure and managing the spending of such funds. The implication of this decentralisation of educational powers in terms of which provinces are tasked with implementing national norms and standards is that 'the quality of policy implementation depends to a large extent on province-level functionality.'[47] National

[44] See generally, Servaas Van der Berg and others, 'Identifying Binding Constraints in Education: Synthesis Report for the Programme to Support Pro-Poor Policy Development' (RESEP, University of Stellenbosch 2016) <http://resep.sun.ac.za/category/focus-areas/education/> accessed 3 December 2018.

[45] Constitution, s 146.

[46] Schedule 4 of the Constitution lists education as one of the functional areas of concurrent national and provincial legislative competence.

[47] Van der Berg and others (n 44) 6.

government retains an oversight role to monitor the performance of these obligations, and is empowered to intervene where a PED has failed 'to fulfil an executive obligation in terms of the Constitution or legislation'.[48]

This dependency on the capacity of PEDs has compounded the structural inequalities left by apartheid. Provinces like the Western Cape and Gauteng inherited strong administrative capacity to implement policy and manage expenditure to benefit schools that were already relatively well-resourced and successful.[49] By contrast, the Eastern Cape inherited a combination of privileged, suburban educational districts and severely neglected, deep rural districts.[50] The challenge lay not only in the diversity of administrative cultures to be amalgamated into one provincial department, but also the dysfunctionality that many of them brought into it.[51] An acknowledgment of these historical complexities is central to an understanding of the current institutional dynamic that animates the LRC's litigation against the ECDOE. During the serialised litigation covered in this case study, the deepening dysfunction of the ECDOE reached crisis proportions, prompting the national DBE to intervene under section 100(1)(b) of the Constitution and assume responsibility for the executive obligations assigned to the provincial government. Accordingly, in many of the LRC's education cases, both the national DBE and the provincial ECDOE are cited as respondents.[52]

[48] Constitution, s 100.

[49] Fiske and Ladd (n 7) 66–67. It is noteworthy that Fiske and Ladd's study is a comparison between the Western Cape and the Eastern Cape as two provinces that strikingly expose the educational inequalities that persist in post-apartheid South Africa.

[50] Paxton (n 9) 7.

[51] Fiske and Ladd (n 7) 67.

[52] The section 100(1)(b) intervention is one of the reasons for my use of the generalised term 'Department of Education' in this case study, thus avoiding confusing switches between ECDOE and DBE.

A second underlying cause of the ECDOE's failure to fulfil its positive duties in education is the lack of accountability for how it spends public resources and manages the provision of education. This is partly due to the dominant influence of the South African Democratic Teachers' Union (SADTU) over the ECDOE, prompting concerns about whether political interests are interfering with the day-to-day functioning of the education system.[53] The Department's close alignment of interests with SADTU and its contrasting disregard for securing the best interests of children arguably points towards the regulatory capture of the Department by SADTU.[54] This undue influence exercised by SADTU takes a range of forms, but the distortion of teacher post-provisioning processes is an important one for this case study.[55] The ECDOE's compliance with post-provisioning norms is particularly troubling, with the numbers of appointed teachers in many schools far exceeding the numbers stipulated by the post-provisioning policy.[56] These 'misplaced' teachers disrupt the student-teacher ratio in schools, with some schools being understaffed while other schools are overstaffed resulting in the ECDOE overspending on teacher salaries. The *Linkside* class action discussed in this case study constitutes a major breakthrough in remedying these distortions in teacher post-provisioning.

The interaction of these two institutional constraints—weak institutional functionality and undue union influence—has a debilitating effect on the ECDOE's

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53 Van der Berg and others (n 44) 7.

54 Morgan and Yeung explain that '[r]egulatory capture happens when officials within regulatory institutions who are charged with promoting collective welfare develop such close relationships with those they regulate that they promote the narrow interests of this group instead of the public interest of the broader community'. Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (CUP 2007) 43.

55 The national policy on teacher post-provisioning norms determines how many teachers should be employed and how they should be allocated to schools. See GN 19627 *GG* 6390 of 18 December 1998.

56 Martin Gustafsson, 'Teacher Supply and the Quality of Schooling in South Africa' Stellenbosch Economic Working Papers 03/16, 35 <www.ekon.sun.ac.za/wpapers> accessed 3 December 2018.

ability to fulfil its positive duties in education. The combined lack of capacity and accountability generates 'a cycle of poor service-delivery, weak accountability and low expectations' which, while arguably pervasive in many government sectors, is especially acute in the basic education system and the Eastern Cape in particular.[57] This case study evaluates the innovative remedies that have sought to counteract the lack of capacity and accountability which are the root causes of the ECDOE's failure to fulfil the right to education and its routine non-compliance with court orders.

II. A Story of Serial Settlement and Serial Non-Compliance

A. Tracing the Trajectory of Remedial Development through Serialised Litigation

This case study traces the remedial developments across three streams of education litigation run by the LRC in the Eastern Cape High Court: (1) *Mud Schools*, (2) *Madzodzo* and (3) the twin cases of *Centre for Child Law* and *Linkside*. They share strong structural similarities, having all taken the form of serialised litigation. Each case began with a settlement between the LRC and the Department of Education and progressed in an episodic fashion as successive court-approved remedial orders met with persistent non-compliance. At each stage the remedial plan was recalibrated in response to the remedial challenges that emerged during the implementation process, and the court-approved orders became increasingly detailed and prescriptive over time. With the exception of *Mud Schools*, this cycle of settlement and non-compliance was broken by a judgment that rebukes the government's non-compliance and provides a well-reasoned justification for the remedial plan selected by the court.

[57] Van der Berg and others (n 44) 25.

Rather than limiting my analysis to the final remedial order of each case, my contextualised evaluation traces the course of remedial development through each stage of the serialised litigation. The potential of the innovative remedial mechanisms featured in each case can only be fully appreciated in the context of the extended remedial process in which they were developed. The settlements with which each case began are not simply a 'backstory' to the judgment, but crucial plot developments which set the stage for the final 'fight scene' in court. Important 'character development' occurs during the initial stages of the litigation, when early implementation difficulties expose institutional strengths and weaknesses, and the reasons for government non-compliance crystallise through reporting and monitoring mechanisms. The plot thickens and tension builds as non-compliance persists, until the court provides an authoritative judgment which clarifies the state's obligations and justifies the resort to an innovative remedy. The remedial innovation in each case is therefore framed as the culmination of a longer process of remedial experimentation and refinement: persistent non-compliance serves as a catalyst for remedial innovation.

While each stream of litigation tells a similar story of serial settlement and serial non-compliance, an even richer narrative emerges when viewing them as a trilogy. Each stream of litigation ran over several years, with some overlap between them, but together they chart a steep learning curve in remedial development which can only be fully appreciated by contextualising the cases within this longer perspective. I have structured the analysis to foreground this learning curve, tracing the trajectory of remedial development over the course of the three streams of litigation. Although I engage with each case in turn—first *Mud Schools* (Section III), then *Madzodzo* (Section IV), before ending with *Centre for Child Law* and *Linkside* (Section V)—my evaluation focuses on the particular remedial innovation that each case contributes to the overall trajectory of remedial development. Thus the sequence of cases maps onto the trajectory of remedial innovation: first experimenting with a two-track remedy to address the challenges of ascertaining systemic relief (Section III), then refining reporting and monitoring requirements to promote accountability for compliance (Section IV), before resorting to the innovation of truly novel remedial mechanisms to compel compliance (Section V). This sequential structure enables the narrative arc of the trilogy to be drawn, but treating each case comprehensively before moving to the next one also has the added advantage of making it makes it easier to follow the complexities of serialised litigation.

B. Court-Approved Remedies in Perspective

By tracing the trajectory of remedial development through each stream of litigation, my contextualised evaluation captures the diversity and fluidity of forms that the court's exercise of discretionary remedial power can take.[58] The two-track remedy piloted in *Mud Schools* was used to structure the initial settlements in the other cases, but what began as a court-*approved* remedy ultimately became a court-*selected* remedy, undergoing multiple revisions and refinements in between this first and last exercise of discretionary remedial power. By looking beyond the four corners of the final court order, we can therefore identify not just the different types of judicial involvement in remedial formulation at each stage of serialised litigation but, more significantly, the continuity between them. The final remedial plan granted by the court is inextricably linked to the iterations which preceded it, and these continuities illustrate the fluidity between approving and selecting remedies as two forms that the exercise of discretionary remedial power can take.

The fluidity between court-approved and court-selected remedies in this case study underscores the importance of the court's responsibility to scrutinise settlement

[58] See my typology of discretionary remedial power developed in Chapter Three, Section V.

agreements before approving them as an order of court. Given the prevalence of court-approved remedies during the early stages of these cases, the dynamic of settlement is an important dimension of my evaluation. Indeed, the LRC's evolving strategy towards settlement negotiations with the Department plots the key co-ordinates in the learning curve which can be charted across the trilogy of cases. Persistent non-compliance with court-approved remedies made it increasingly clear that the Department's consent to a remedial plan did not correspond with any genuine intention to comply with it. The LRC, in turn, grew increasingly confident in asserting its demands during settlement negotiations. While settlement was somewhat unexpected in *Mud Schools*, the LRC anticipated it with bold demands in *Madzodzo* and concentrated their efforts on promoting accountability for compliance. Finally, in *Centre for Child Law*, they proactively leveraged settlement in anticipation of continued non-compliance. This evolving dynamic of settlement, peaking with the LRC capitalising on its power to dictate the remedy during negotiations, draws attention to the dangers of courts lending their unreflective approval to settlement agreements. While the *Linkside* judgment later gave explicit judicial approval to the bold remedial innovation developed in *Centre for Child Law*, its genesis as a court-approved remedy side-stepped initial consideration as to whether it is an appropriate, let alone optimal, remedy for the state's continuing failure to fulfil the right to education.

III. Ascertaining Systemic Relief: *Mud Schools*

A. The Interface Between Law and Policy

The first stream of education litigation considered in this case study concerns the problem of mud schools and other inappropriate classroom structures across the Eastern

Cape province. Given the historical context set out in Section I, it is no coincidence that the Eastern Cape has an acute school infrastructure backlog, since the dilapidated, crumbling mud schools are 'the leftovers of a deliberate strategy during the apartheid years not to invest in schools for black children'.[59] In 2010, the LRC helped set up 'infrastructure crisis committees' at seven of the worst-off schools which had been built using mud and branches (or locally sourced wood) and had dilapidated corrugated iron and thatch roofs that were dangerously unstable.[60] Represented by the LRC, these seven schools and the Centre for Child Law (CCL) launched an application in the Grahamstown High Court: *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* (ECB) unreported case no 504/10, which is generally known as the '*Mud Schools*' case. The central argument put forward in *Mud Schools* was that the right to education includes the right to study in classrooms and environments that are safe and conducive to learning, such that the Education Department's conduct and policies were unconstitutional insofar as they failed to provide the infrastructure and basic facilities required for an adequate education.[61] The *Mud Schools* case is important for confirming the link between the adequacy of education and the physical conditions in schools, and – especially pertinent in the context of this thesis – the state's positive duties in this regard.

This was by no means a controversial claim, however, since government officials had themselves conceded that the deplorable conditions at mud schools amounted to a breach of the state's duty to fulfil the right to education.[62] Targets to eradicate mud schools were set in the DBE's annual reports and it was confirmed as a key priority on

[59] Ann Skelton, 'Leveraging Funds for School Infrastructure: The South African "Mud Schools" Case Study' (2014) 39 International Journal of Educational Development 59, 60.

[60] Ann Skelton Founding Affidavit, *Mud Schools* (16 August 2010) [20.1] (*Mud Schools* Founding Affidavit). The affidavit is reproduced in *Ready to Learn* (n 43) 22–31.

[61] *Mud Schools* Founding Affidavit (n 60) [23].

[62] *Ready to Learn* (n 43) 19.

numerous occasions by a range of politicians and education officials, from the Eastern Cape Premier to the South African President.[63] Moreover, the government's continued failure to meet these targets was, on its own admission, the result of institutional setbacks experienced in the ECDOE. In its 'Discussion Paper on Infrastructure',[64] the ECDOE identifies budget cuts, understaffing and disruptions in service delivery as reasons for its lack of progress in dealing with the infrastructure backlog in the province.[65] Most significantly, it describes its school infrastructure budget as 'wholly inadequate',[66] recognising that eliminating the backlog 'within a reasonable timeframe will require a quantum step up from existing budget levels'.[67] These policies and political promises demonstrate the necessary political will to eradicate mud schools in the Eastern Cape, but the ECDOE's lack of capacity, including budgetary capacity, prevented any meaningful progress from being made. In resorting to litigation, the LRC sought to leverage the courts to hold the government accountable for delivering on its own policies and to ensure a remedial plan is in place to facilitate this. The *Mud Schools* case therefore stands at the interface between law and policy in respect of the right to education, exploring how litigation can bring a sharper edge to accountability by 'hardening' policy commitments into legal obligations.

B. The Two-Track Remedy

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[63] *Mud Schools* Founding Affidavit (n 60) [38].

[64] 'Discussion Paper on Infrastructure' (Eastern Cape Department of Education 2009) <www.ecdoe.gov.za/files/resources/resource_158.pdf> accessed 28 July 2017.

[65] ibid 8.

[66] ibid.

[67] ibid 4.

In spite of their own policies and repeated promises to eradicate mud schools, the government initially opposed the LRC's application. They filed papers arguing that the seven applicant schools were not the worst off and would receive attention when sufficient budget for infrastructure improvements became available.[68] In a last-minute reversal of their stance, however, the Department indicated their willingness to offer both temporary and permanent relief to the seven applicant schools. After further negotiations, a settlement was reached in February 2011 taking the form of a two-track remedy.[69]

1. Optimising Effective Relief through Two-Stage Individualised Relief

The 'individualised track' of the two-track remedy agreed on by the parties in *Mud Schools* concerned relief for the seven applicant schools. This did not take the form of a 'one-shot' solution but was instead structured as a two-stage or staggered remedy consisting of (a) *immediate temporary* relief and (b) *later permanent* relief. As a matter of urgency, it was settled that temporary infrastructure relief must be provided to the seven applicant schools in the form of mobile (prefabricated) classrooms, desks and chairs, and water. A deadline of 31 March 2011 for supplying this temporary relief was agreed on by the parties. This would be followed by the construction of permanent classrooms at the seven schools, to be commenced by 31 May 2011 and completed within one year.

In recognising the need for both immediate temporary relief and more meaningful permanent relief for the applicant schools, the Principle of Effective Relief is optimised by giving *maximal* effect to the right to education. The factual impossibility of providing

[68] See *Ready to Learn* (n 43) 20.

[69] This memorandum of understanding was an out-of-court settlement, not approved by the court as later settlements were.

immediate permanent relief (classrooms cannot be built overnight) was not allowed to undermine the urgency of the claimant schools' infrastructure needs. At the same time, however, the immediate provision of temporary relief did not distract from the imperative to *fully* vindicate the right to education by providing permanent classrooms in the longer term. The remedial challenges of implementing relief in two stages—not least the extra cost and logistical planning—were not allowed to permeate and so undermine the normative content of the right to education. By contrast, a one-shot solution limited to urgent temporary relief would have offered suboptimal relief by consigning the prospect of permanent relief for the seven claimant schools to a province-wide systemic plan for infrastructure improvements. Instead, the two-stage individualised track laid out specific details and deadlines for the provision of permanent relief, thus reflecting both a high prioritisation and an optimisation of Effective Relief.

2. Maximising the Scope of Relief through the Systemic Track

The 'systemic track' of the two-track remedy concerned the budget and the plan for eradicating *all* mud schools and other inappropriate school structures across the Eastern Cape province, and indeed even the whole country. The settlement reached between the LRC and the ECDOE recorded that national government would commit R8.2 billion to replacing inadequate school structures across South Africa, of which R6.36 billion would be allocated specifically to schools in the Eastern Cape up until 2015. The agreement was that this budget would be spent over the three-year period to eradicate approximately 500 inappropriate school structures. The program which arose out of this *Mud Schools* settlement is known as the 'Accelerated Schools Infrastructure Development Initiative' (ASIDI).

In triggering the formulation of a national programme for structural reform, the systemic track of the remedy was responsive to the wider problem of mud schools. Indeed, the systemic implications of the state's failure to provide adequate school structures could not have been more fully captured: the scope of relief was maximised through a plan for the country-wide structural reform of school infrastructure. The two-track remedy therefore optimised the Principle of Systemic Compliance by securing the *fullest scope* of systemic relief. Given the inadequate infrastructure budget that had crippled the ECDOE's progress so far, ASIDI represented a major breakthrough in promoting Systemic Compliance—it not only put in place a concrete plan for systemic reform but also secured a complementary budget for achieving it.

3. A Strategic Combination of Clients

The two-track structure of relief in *Mud Schools* was a direct result of the LRC's coupling of individual claimants with an institutional claimant. The individual claimants were particular schools acting in their own interest while the CCL acted in the public interest to address the systemic implications of the state's failure to provide adequate school infrastructure. Instead of casting individual relief and systemic reform as competing priorities, however, the two-track remedy capitalised on the synergy created by this combination of clients. The seven claimant schools offered concrete, specific evidence of the state's failure to provide the necessary infrastructure and facilities that children are entitled to under the right to education. The urgency of their claim grounded the need for immediate individualised relief, but also served as particular, representative breaches that made the CCL's generalised claim for systemic improvement more compelling. Expanding the scope of the claim through the inclusion of the CCL as an institutional claimant therefore required relief to be scaled up from the seven individual schools to all mud schools in the province. Rather than pitting individual claimants against similarly situated rights-holders who are absent from proceedings, this strategic combination of clients enabled the two-track remedy to be structured in a way that optimises both Effective Relief and Systemic Compliance.

The dynamic of settlement offered a conducive environment for optimising Effective Relief and Systemic Compliance. Firstly, settlement avoided contestation about whether school infrastructure and facilities form part of the content of the right to education, as the government implicitly acknowledged this by consenting to the terms of the agreement.[70] This concession quickly shifted the focus of negotiation to the formulation of a remedial plan for providing comprehensive relief to the seven schools and systemic relief to mud schools across the country. Had the government disputed the extent of its positive duties, the court might have granted urgent temporary relief to the applicant schools but deferentially left the prospect of individualised permanent relief to the implementation of a systemic plan for reform. Secondly, settlement helped clinch the government's commitment to a budgetary figure for systemic reform. It is likely that a court would have refrained from specifying budgetary figures[71] to support a plan for eradicating all mud schools had the government contested the claim. By contrast, the government's commitment under ASIDI sets significant budget allocations and targets for the systemic reform of mud schools.

C. An Accountability Blind Spot Exposed

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[70] Skelton (n 59) 62.

[71] This is what the New York Court of Appeals did in *CFE IIc*, leading to a political deadlock in negotiations about the budget. See the discussion in Chapter Five, Section III.B.

The two-track remedy in *Mud Schools* was accompanied by a provision giving the parties a right to approach the High Court on an expedited basis in the event of non-compliance with the settlement. While this facilitated quick access to the court following non-compliance, it was not a prophylactic measure that reduced the risk of non-compliance in the first place. This accountability 'blind spot' was exposed in the follow-up to the *Mud Schools* settlement. While the individualised relief for the seven applicant schools was implemented relatively successfully,[72] the implementation of ASIDI had been very poor. The ECDOE made some headway in the three-year period following the settlement – 63 schools with poor infrastructure had been replaced and construction at a further 230 schools was either underway or at an advanced stage of planning – but the scale of this progress is quickly diminished when put into perspective.[73] By January 2014, ASIDI was far behind schedule as some 200 of the identified schools were yet to be rebuilt but no plans were in place for achieving this, and many of these schools were not aware that they were due to benefit from the infrastructure programme.[74] Even more seriously, the scale of the problem of mud schools was not known by the ECDOE itself, since many schools with inappropriate structures did not appear on the ASIDI master list and therefore had little hope of receiving assistance.[75] Put into financial perspective, a mere quarter of the budget allocated to ASIDI by the National Treasury had been spent over this three-year period.[76]

[72] *Fighting to Learn* (n 43) 7.

[73] ibid.

[74] ibid.

[75] ibid.

[76] ibid. The details of the government's under-spending of the infrastructure budget are set out in Carmen Abdoll and Conrad Barberton, *Mud to Bricks: A Review of School Infrastructure Spending and Delivery* (PULP 2014).

This very partial implementation of ASIDI demonstrates how the absence of strong accountability mechanisms to promote compliance can undermine the implementation of systemic relief. Firstly, the remedy was not sufficiently responsive to the institutional reasons that had so far prevented the government's progress in reaching their own target of eliminating mud schools. The government's lack of capacity to replace mud schools did not simply consist of an inadequate budget but also a lack of meaningful support to carry out a plan for improving school infrastructure. Indeed, Ann Skelton has identified four dimensions of implementation that are required to achieve full compliance in the *Mud Schools* case—budgeting, spending, procurement and construction.[77] A 2014 monitoring report commissioned by the CCL, entitled *Mud to Bricks: A Review of School Infrastructure Spending and Delivery*, finds that the availability of funds did not play a role in the poor implementation of ASIDI.[78] On the contrary, the government threw money at the problem of mud schools but its inability to formulate and execute a plan for spending it on infrastructure projects resulted in its consistent and substantial under-spending of the allocated budget.[79] The *Mud to Bricks* report concludes that this under-spending was 'due to poor capacity within the Department to manage an infrastructure programme of this size' which is apparent from the 'severe understaffing of its infrastructure unit and poor planning.'[80] Furthermore, even where infrastructure projects were undertaken, progress was often stalled by problems with the procurement process or the implementation of contracts, such as contractors going bankrupt.[81]

[77] Skelton (n 59) 61.

[78] Abdoll and Barberton (n 76) viii. See further Skelton (n 59) 62.

[79] Abdoll and Barberton (n 76) viii.

[80] ibid.

[81] In this regard, Abdoll and Barberton recommend that the Department restructure contracts to attract bigger construction companies to do the work or at least to oversee subcontractors, and to introduce penalty clauses for non-completion. See ibid.

Optimising Institutional Responsiveness in these circumstances would require a more careful calibration of the remedy to the multi-faceted nature of the institutional challenges which accounted for the government's lack of capacity.

Secondly, compliance was undermined by the fact that the scale of the problem of mud schools was not known. Without an accurate audit of all mud schools in the province, the LRC realised that it lacked comprehensive evidence to hold the government accountable for its failure to comply fully with the settlement. Indeed, as noted already, the scale of the problem was unknown to the ECDOE itself.[82] The remedy did not account for this institutional weakness in the ECDOE by requiring an audit of all mud schools to be undertaken, thus reflecting a suboptimal realisation of Institutional Complementarity. The lack of transparency that left listed mud schools unaware of their entitlement to infrastructure improvements also speaks to the potential role that public reporting could have played in holding the ECDOE accountable for implementing ASIDI. Requirements relating to auditing and public reporting would have optimised Institutional Complementarity by proactively holding the government to account for its implementation of systemic relief and empowering the LRC, the CCL and the schools due to benefit from ASIDI to track compliance with the settlement.

D. Mud Schools II and Contempt Proceedings

The LRC turned to court in January 2014 to address these two weaknesses of the remedial plan that had been exposed in the follow-up to the settlement.[83] In *Mud Schools II*, the LRC once again acted on behalf of the CCL and a group of individual claimants

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[82] Skelton (n 59) vi.

[83] *Makazíwe Maqhelana and Five Others v Government of the Republic of South Africa and Others* (ECG) unreported case no 7/2014 (21 August 2014) (*Mud Schools II*).

(five mud schools in need of urgent relief) to secure a two-track remedy. The government consented to the terms of the order sought by the LRC, which was subsequently approved as an order of the court by Brooks AJ in August 2014. Besides an order directing the government to provide emergency relief to the five applicant mud schools,[84] the rest of the settlement agreement focused on promoting accountability for compliance with a systemic plan for providing relief to all mud schools in the province.

First, the order directed the government to develop and publish a comprehensive plan for replacing all mud schools in the province.[85] The detailed guidelines for complying with this order reflect an improved Institutional Responsiveness to the government's weak institutional functionality in devising and carrying out a plan for systemic reform. The plan was required to include precise details of the infrastructural assistance each school would receive and a timetable for completion.[86] An important deliberative aspect of the order directed the government to publish the criteria for deciding whether to include a school on the ASIDI list, thereby setting out the standards for what qualifies as a mud school, and to give schools an opportunity to motivate for their inclusion on the list.[87] This reflexive mechanism not only improves the transparency of the programme for structural reform, but also empowers rights-holders to assert their constitutional entitlements and encourages them to participate in the monitoring process. This was complemented with the more coercive imposition of a strict deadline for compliance: the government had to produce the required list of schools and

84 ibid [5].

85 ibid [1].

86 ibid [1.1].

87 ibid [1.3]-[1.4].

comprehensive plan for implementation within 45 days of the settlement being made an order of the court.[88]

The government did not meet the 45-day deadline set in *Mud Schools II*, however, without giving any reason for their non-compliance. The LRC therefore filed a contempt application in April 2015 in which they sought compliance within 15 days of a new court order being granted or, alternatively, that the ECDOE be directed to appoint an independent administrator to perform the task the ECDOE should have completed.[89] This bold move reflects the LRC's evolving strategy to negotiations with the Department over the five-year period since the *Mud Schools* litigation began in 2010. In particular, the threat of resorting to an independent administrator was a lesson learned from the remedial experimentation with independent auditing in *Madzodzo*, which unfolded during the intervening years between the initial *Mud Schools* settlement in 2010 and the final contempt application in 2015.[90] Securing compliance with ASIDI has proved to be a long process,[91] but the DBE's latest annual report reveals much-improved expenditure[92] and monitoring mechanisms to oversee the appointment, implementation and successful completion of ASIDI projects.[93]

Although the government's serial non-compliance with the *Mud Schools* settlements never culminated in a judgment, the successful piloting of a two-track remedy informed

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[88] ibid [6.1].

[89] Ann Skelton Founding Affidavit, *Mud Schools III* (14 April 2015) [49]-[51] <http://resources.lrc.org.za/wp-content/uploads/2017/03/2015-04-14_Mud-Schools-3_FA_GHT-HC.pdf> accessed 5 December 2018 (*Mud Schools III* Founding Affidavit).

[90] *Mud Schools* began in 2010 and continued into 2015, while *Madzodzo* began in 2012 and culminated in a judgment handed down in 2014.

[91] LRC embarked on its own major monitoring campaign to track the government's progress, discovering many inaccuracies in the ASIDI lists and being struck again by the scale of the work still to be done. See *Mud Schools III* Founding Affidavit (n 89) [32]-[33].

[92] See 'Annual Report 2017/2018' (n 34) 139, 222, 278.

[93] See ibid 14.

the structuring of relief in the LRC's future litigation on the right to education. It demonstrated how both Effective Relief and Systemic Compliance could be optimised, and helpfully brought to light the multi-faced challenge of ensuring compliance with the implementation of systemic relief. *Madzodzo* provided an opportunity to refine the remedial mechanisms of auditing and reporting to optimise Institutional Responsiveness and Institutional Complementarity. It is to this next stream of litigation that we now turn to continue tracing the trajectory of remedial development in the LRC litigation on education.

IV. Promoting Accountability for Compliance: *Madzodzo*

A. Auditing Systemic Compliance

1. Counting the Nuts and Bolts of School Furniture

The second stream of LRC education litigation considered in this case study concerns the severe furniture shortages in schools across the Eastern Cape. While *Madzodzo* specifically concerned the provision of school furniture, the litigation was closely linked to a broader advocacy effort by the LRC and its civil society partners to compel the DBE to pass uniform binding norms and standards for school infrastructure. Having undertaken extensive site visits over a period of several years, the LRC observed the enormity of the problem:

> [T]housands of children still sit on the ground because their classrooms have no, or an insufficient number of, desks and chairs. They hunch over workbooks and crane their necks to see the blackboard. They often get sick from sitting for hours on cold, dirty floors.[94]

[94] *Ready to Learn* (n 51) 51.

In August 2012, the LRC filed an urgent application in the Mthatha High Court, building on the strategy that yielded a strong two-track remedy in *Mud Schools*. The LRC once again represented a combination of individual and institutional clients—three individual schools acting in their own interest and the CCL acting in the public interest. The relief sought was also structured to address both the urgent furniture needs of the individual applicant schools and the systemic shortage of furniture in schools across the province. Through the negotiations that followed this exchange of pleadings, the LRC reached a settlement with the government and obtained a court order by agreement on 29 November 2012. This represented a significant acknowledgment that desks and chairs 'count' as vital components of the right to education but, as we shall see, the key challenge in *Madzodzo* lay in accurately auditing the furniture needs of schools across the whole province. Counting the nuts and bolts of school furniture was a more difficult task than identifying the number of mud schools that remained in the province, and therefore called for a refined two-track remedy.

2. Refining the Two-Track Remedy

The structuring of relief in *Madzodzo* flowed from the LRC's continued strategic coupling of individual claimant schools with an institutional client. The individualised track of the remedy was more straightforward than its counterpart in *Mud Schools*, however, as the provision of desks and chairs could be achieved through a 'one-shot' order rather than a two-stage implementation of relief. The order therefore simply directed the government to provide the three applicant schools with adequate furniture.[95] Importantly, however, the urgency of these schools' furniture needs precluded individual relief being folded into

[95] *Madzodzo and Others v Minister of Basic Education and Others* (ECM) unreported case no 2144/2012 (29 November 2012, Griffiths J) [1] (*Madzodzo I* court order).

the broader question of systemic relief. By requiring the immediate provision of desks and chairs to the claimant schools, the individualised track gives maximal effect to the immediately realisable nature of the right to education, thereby optimising the Principle of Effective Relief.

The systemic track of the remedy was a two-stage plan for meeting the furniture needs of all schools in the Eastern Cape. First, the government was directed to complete a comprehensive audit to record the furniture shortages of all schools in the Eastern Cape, to be finalised by 28 February 2013.[96] Rather than simply ordering the government to ensure that all schools in the province have sufficient desks and chairs, the auditing requirement prompted the government to follow a systematic plan for fulfilling its positive duty in this regard. This plan was detailed with several stipulations: (i) the appointment of a 'Furniture Task Team'; (ii) the publication and communication of a circular informing all schools in the province of the audit and inviting them to submit their furniture needs to the ECDOE; and (iii) the verification of furniture requests through visits to these schools to ensure their furniture needs are accurately recorded.[97] These stipulations were accompanied by deadlines, thereby creating a clear timeline for completion of the audit. As the second stage of the plan for providing systemic relief, the court order noted that the government would 'endeavour to ensure' that the furniture needs established through the audit would be delivered to schools throughout the province by 30 June 2013.[98]

This staggered structuring of systemic relief, involving an auditing stage and a delivery stage, reflects the lesson learned in *Mud Schools* that the government's progress in

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[96] ibid [3].

[97] ibid [3.2].

[98] ibid [5].

implementing systemic relief cannot be monitored unless the scale of the problem is first ascertained. The detailed stipulations, from appointing a dedicated Furniture Task Team to verifying the furniture requests submitted by schools, were aimed at ensuring the audit would be comprehensive and accurate, so that the progress of implementing systemic relief could be tracked. In this way, the remedy not only optimises Systemic Compliance by requiring the fullest scope of relief to be implemented, but also prescribes a method for capturing the needs of schools affected by the government's breach of its positive duty to provide adequate furniture. This demonstrates improved Institutional Responsiveness to the weak institutional capacity of the ECDOE by devising a concrete plan, with clear deadlines, to aid the implementation of systemic reform.

As with *Mud Schools*, the court-approved remedy in *Madzodzo* gave the parties the right, in the event of non-compliance, to return to court on an urgent basis without needing to start fresh litigation. The court order gave advance leave for proceedings seeking to resolve any dispute regarding the furniture to be delivered to each school in terms of the audit.[99] An important refinement in *Madzodzo* was achieved through a better calibration of the remedial plan to the government's weak institutional functionality which could hinder compliance. To better promote accountability for compliance, the remedy was fortified with extensive reporting requirements so that the government would update the LRC on its progress during both the auditing phases and the delivery phase for implementing systemic relief. Firstly, it had to furnish the LRC with a copy of the completed audit report, along with a detailed plan and timeline for the delivery of desks and chairs to all schoolchildren in the province.[100] Secondly, it had to report to the LRC on their compliance with the implementation of systemic relief, including their

[99] ibid [7.2].

[100] ibid [3.1].

progress with the actual delivery of furniture to schools.[101] These reporting requirements, bolstered by deadlines, sought to ensure that the LRC could monitor the government's implementation of systemic relief. Given the lack of transparency about the implementation of ASIDI that left many schools unaware of the planned infrastructure projects in *Mud Schools*, the LRC insisted that the government be required to give written notice to all the schools due to receive furniture, detailing what specific desks and chairs they had been allocated and when such furniture would be delivered.[102] A deadline was also attached to this notice requirement.

While both *Mud Schools* and *Madzodzo* featured the same kind of remedy, namely a mandatory interdict directing the government to provide systemic relief (appropriate classroom structures and desks and chairs, respectively), the refinements in *Madzodzo* demonstrate improved Institutional Responsiveness to the government's lack of capacity. The two-phase structuring of the systemic track provided a detailed blueprint to assist the government overcome the practical challenges of ascertaining and meeting the furniture needs of all schools in the province. This was complemented by the addition of extensive reporting requirements to meet the need for greater transparency in the implementation process. By building in these auditing and reporting requirements, the systemic track of the remedy was therefore better calibrated to the demonstrated difficulty the ECDOE had in devising and implementing a plan for structural reform.[103]

3. Reporting as a Diagnostic Tool for Detecting Non-Compliance

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[101] ibid [7].

[102] ibid [4].

[103] When litigation in *Madzodzo* started, the DBE had already intervened to take over the executive functions of the ECDOE in terms of section 100(1)(b) of the Constitution.

In spite of the detailed blueprint to guide the government in its implementation of systemic relief, compliance with the court order was partial and begrudging. As in *Mud Schools*, the individualised relief was implemented as required—the government duly delivered desks and chairs to the three applicant schools during January 2013.[104] Yet very little had been done by the government to implement structural relief, and much of what had been done was either ineffectual or inadequate. The main problem in this regard was the Department's inaccurate and incomplete audit of the school furniture needs for the province. The Department had not made its task any easier by failing to issue a circular informing schools of the audit and inviting them to submit their furniture needs, as required by the court order. It was therefore unsurprising that many schools had been excluded from the audit and that the furniture needs recorded for those schools that were included in the audit had not been verified.[105] Confidence in the accuracy of the audit was further undermined by glaring data irregularities, with similarities across school districts raising strong suspicions of data falsification.[106]

The Department had failed to comply with the court order in other key respects too. It failed to present the LRC with a comprehensive plan setting out when it would deliver the furniture recorded in the (inaccurate and incomplete) audit,[107] and also failed to inform those schools due to receive furniture what they would receive and when it would be delivered.[108] Another obstacle to implementation was the inadequacy of the furniture budget, with less than 10 per cent of the required R360 million having been

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[104] Ann Skelton Supplementary Founding Affidavit, *Madzodzo II* (27 August 2013) [11] (*Madzodzo II* Supplementary Founding Affidavit). This affidavit is reproduced in *Ready to Learn* (n 43) 54–62.

[105] *Madzodzo II* Supplementary Founding Affidavit (n 104) [31]-[32].

[106] ibid [33].

[107] ibid [25].

[108] ibid [46].

allocated to addressing the furniture shortage in 2013/2014.[109] Having failed at this first stage of the plan for implementing structural relief, it was unlikely that the delivery phase of the plan would have been complied with, and indeed, by August 2013 no furniture had been delivered to schools using the R30 million budget that was in place.[110]

It was therefore clear that the Department had no reliable mechanism to ascertain or fund the actual furniture needs of schools in the province.[111] Yet while the Department fell at this first hurdle, the reporting requirements nevertheless served a valuable role in exposing these problems. The LRC was able to establish the extent of non-compliance when the Department submitted an incomplete and inaccurate audit and failed to present a plan for the delivery of the recorded furniture. The LRC was therefore able to pick up on non-compliance much sooner than it did in *Mud Schools*, and had clear grounds for returning to court.

4. Resorting to an Independent Auditor

The LRC filed an urgent application in August 2013 with the bold request that the Department be directed to appoint and pay an independent auditor. This remedial strategy was not newly envisaged by the LRC, as it had sought the appointment of an independent administrator during the early negotiations leading up to the initial settlement.[112] The Department had strongly resisted this move at the time, however, claiming that an independent auditor was unnecessarily intrusive as they had already

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109 ibid [12.1].

110 ibid [12.2].

111 ibid [48].

112 ibid [54].

undertaken an audit which simply needed updating.[113] Relying on this expression of political will, the LRC conceded that an independent auditor need not be appointed and the settlement therefore allocated the task of auditing to the Department. The inaccurate and incomplete audit subsequently presented by the Department led the LRC to regret this concession, as noted by Ann Skelton's Supplementary Founding Affidavit during the second round of litigation in *Madzodzo*: 'We negotiated in good faith with the respondents and granted their request to leave the audit process in their hands. This has proven a grave error.'[114] At this second stage of the litigation, however, the Department agreed to the appointment of an independent auditor and the settlement was made an order of the court by Makaula J in September 2013.

The appointment of an independent auditor is a remedial escalation that reflects both a shift to a more coercive remedial mode and an adjusted institutional division of constitutional labour. While the first settlement in *Madzodzo* had deferred to the Department to undertake an audit, the resort to an independent auditor is an acknowledgment that the debilitating effects of the Department's lack of capacity call for an alternative means of performing this function. The remedial plan approved by Makaula J outlines a revised allocation of constitutional labour required to implement systemic relief.[115] The order identifies the specific tasks that the independent auditor was required to undertake in order to remedy the Department's failed audit. This included receiving reports from schools that had been left out of the audit and visiting the schools to verify their furniture needs.[116] The Department was directed to advertise a truncated

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[113] ibid [55].

[114] ibid.

[115] *Madzodzo and Others v Minister of Basic Education and Others* (ECM) unreported case no 2144/2012 (26 September 2013, Makaula J) (*Madzodzo II* court order).

[116] ibid [4.1].

version of the court order in the media and invite schools to submit their furniture requests.[117] This *public* notice requirement represents an escalation of the notice requirement in the first *Madzodzo* settlement, which merely required a circular to schools, and has the added value of raising public awareness of the audit and the Department's duty to provide desks and chairs to all schools in the province. The Department was also tasked with filing the revised audit at court and presenting a comprehensive plan for procuring and delivering the furniture as recorded by the independent auditor to all schools in the province.[118] This remedial plan demonstrates how improved Institutional Responsiveness can illuminate institutional weaknesses which may in turn call for an adjusted institutional division of constitutional labour to optimise Institutional Complementarity. In this regard, the appointment of an independent auditor was not simply a more coercive enforcement technique but also a major adjustment of institutional functions.

B. Supervisory Jurisdiction over Deadlines

Following the appointment of an independent auditor to ascertain and verify the furniture needs of schools across the Eastern Cape, the LRC continued to closely monitor the Department's implementation of systemic relief in *Madzodzo*. In spite of the appointment of the independent auditor, the institutional inertia in the Department continued to impede any meaningful progress from being made. By February 2014, children were still sharing desks and sitting on makeshift chairs such as beer crates,

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[117] ibid [4.3].

[118] ibid [5], [9].

empty paint cans and sacks.[119] It was clear that the Department was dragging its feet, and that its readiness to settle on the terms proposed by the LRC had not been accompanied by a genuine intention to comply with the court orders. A third round of litigation therefore ensued, this time culminating in a judgment from Goosen J.[120] The increasingly evident intransigence underlying the Department's persistent non-compliance received a sharp judicial rebuke and the remedial plan for systemic relief was further refined to optimise Institutional Responsiveness.

1. Affirming the Immediately Realisable Right to Education

The judgment of Goosen J represents an important milestone in *Madzodzo* as it gave explicit judicial recognition, in contrast to the implicit recognition of a court-approved settlement, that the state had a positive duty to provide desks and chairs to all schoolchildren across the province. At the outset, Goosen J pointed to the textual framing of section 29(1) of the Constitution to confirm that the right to education was unqualified and therefore immediately realisable.[121] He observed in relation to the nature of the right that:

> This has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided.[122]

Goosen J therefore inferred from the immediately realisable nature of the right that the state has a positive duty to take all reasonable measures to ensure the provision of all

[119] *Fighting to Learn* (n 43) 37.

[120] *Madzodzo* (n 4).

[121] ibid [15].

[122] ibid [17].

necessary conditions for giving immediate effect to the right. Importantly, this was not confined to access to education because it also 'necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners.'[123] He therefore concluded that inappropriate or insufficient furniture, like desks and chairs, constituted a breach of the state's positive duties.[124] This careful reasoning prevented the remedial challenges of enforcement from tolerating a watered-down understanding of the immediately realisable right to education and its implications for the state's positive duties.

2. Rejecting Excuses for Non-Compliance

Having clarified the nature and content of the right to education and the state's corresponding positive duty to provide school furniture, Goosen J turned to consider the Department's defence of its non-compliance with the second *Madzodzo* settlement in which an independent auditor had been appointed and a deadline for delivery of all furniture had been set. The argument put forward by the Department was two-fold, and resembled the justifications frequently offered in relation to the failure to fulfil socio-economic rights: firstly, that budgetary constraints and the availability of resources had constrained their ability to satisfy the basic requirements of the right to education immediately and, secondly, that it was unreasonable to impose a fixed deadline by when the furniture needs of all public schools must be met.[125]

[123] ibid [20].

[124] ibid.

[125] ibid [22].

In rejecting the first argument, Goosen J relied on the Constitutional Court's holding in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*:

> The court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.[126]

The government's failure to ensure that an adequate budget was made available for providing desks and chairs to all schoolchildren in the province was therefore rejected as a defence for not giving immediate effect to the right to education. In respect of the Department's second argument, Goosen J was scathing of the government's resistance to a fixed deadline for furniture delivery because 'the effect of the open-ended approach' that they propose 'offers little or no prospect that the furniture crisis will be addressed in the foreseeable future.'[127] The judgment strongly holds that the immediately realisable nature of the right to education requires a clear timetable for the provision of relief.

Although the Department relied on these defences of budgetary constraints and impossibly short deadlines to claim that their non-compliance was not wilful,[128] Goosen J maintained that these excuses 'must be viewed against the backdrop of what has transpired since this application was first brought by the applicants in October 2012.'[129] Contextualising the ostensible reasons for non-compliance within this longer perspective, he described their reliance on the unreasonableness of the deadlines in the settlement as 'extraordinary in light of the fact that the terms of the order made by Griffiths J were negotiated between the parties and were accepted by the department's officials as

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[126] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) [74] (Van der Westhuizen J).

[127] *Madzodzo* (n 4) [33].

[128] ibid [31].

[129] ibid [23].

reasonable at the time that Griffiths J granted the order'.[130] Goosen J therefore implied that the Department's *post hoc* excuses exposed their lack of any genuine intention to comply with the terms of the settlement.

In so roundly dispensing with these excuses, Goosen J demonstrated a robust response to the repeated non-compliance of the Department with the terms of the settlement. He justified his strong stance with reference to the constitutional mandate on courts to ensure the government fulfills rights, arguing that '[t]his court, in the exercise of its jurisdiction, is obliged to give effect to the fundamental rights enshrined in the Constitution and to make appropriate orders to vindicate those rights where such orders are required'.[131] Goosen J's remedial order accordingly included a declaration that the Department was in breach of the second court-approved remedy in *Madzodzo*.[132] This optimised Effective Relief by refusing to allow non-compliance to compromise the imperative of giving maximal effect to the immediately realisable right to education.

3. Ameliorating Deadlines for Systemic Relief

Goosen J's reasoning demonstrates a refined calibration of the remedial plan to the underlying reasons for the government's persistent non-compliance. His remedial order directed the Department to submit a revised independent audit to the court and the LRC, and to subsequently deliver all the furniture to schools in the province as recorded

[130] ibid [27].

[131] ibid [36].

[132] ibid [41.1-2].

in the audit within 90 days thereafter.[133] Goosen J justified his selection of the LRC's proposed 90-day deadline in the following terms:

> It was suggested by the respondents that this cannot be achieved within a period of 90 days. The respondents however, could not and did not suggest how long it might in fact take. This court is therefore left without guidance from the respondents as to what they consider would be a reasonable period. In the light of this, I am compelled to conclude that a period of 90 days is indeed a reasonable period within which it may be expected that the identified furniture needs of public schools in the Eastern Cape Province can be met.[134]

This reasoning reflects an openness to receiving input from the government about what timeline would be reasonable but a refusal to allow the Department's preference for an open-ended approach to undermine the need for a clear timeline for the provision of systemic relief.

This timetable for providing systemic relief was then carefully fine-tuned in response to the institutional dynamic that had so far animated the serialised litigation in *Madzodzo*. Having exposed the Department's *post hoc* excuses as revealing a lack of genuine intention to comply with the settlement, Goosen J was careful to calibrate the remedy to this underlying intransigence. First, he argued in light of the Department's non-compliance that 'this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations'.[135] The retention of supervisory jurisdiction was therefore clearly linked to the possibility that the Department might continue to drag its feet unless a more robust accountability mechanism is included.

Secondly, Goosen J crafted the remedial order with sensitivity to the fact that a more dynamic use of remedial mode was required than the coercive imposition of a strict

[133] ibid [41.3-4].

[134] ibid [40].

[135] ibid [36].

timetable for systemic relief. He therefore ameliorated the effect of the 90-day deadline for furniture delivery by allowing for the Department to apply for an extension of time:

> To the extent however, that the exigencies of executing so significant a project may give rise to legitimate delays and therefore a legitimate inability to meet that projected time period, it will be appropriate to order that the time period may be extended at the instance of the respondents, subject to full disclosure as to the steps already taken to meet the deadline and the projected time period within which the needs will indeed be met.[136]

While still insisting on the need for a clear timeline for the provision of systemic relief, Goosen J nuanced his choice of a 90-day deadline by allowing the Department to request an extension if it presents good reasons for the court to condone the delay. This demonstrates a more reflexive remedial mode that encourages deliberative and co-operative problem-solving. The resulting order optimises Institutional Responsiveness by striking a fine balance between the coercive imposition of a timetable for systemic relief and a more reflexive recalibration of the remedial order in response to unforeseen, but legitimate, implementation difficulties.

4. Deadline Extensions and Spin-Off Litigation

This opening for the Department to apply for an extension of the deadline for furniture delivery should not be seen as a weakness of Goosen J's remedy. Rather, recognising the likelihood that compliance would be patchy irrespective of any deadline, it sought to ameliorate or enhance the fixed deadline by requiring the Department to present a progress report and disclose the reasons for its non-compliance when it applied to the court for an extension. The value of this dynamic use of remedial mode for increasing transparency and accountability was demonstrated when, unsurprisingly, the Department requested an extension in May 2014.[137] While predictably relying on their staple excuse of

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[136] ibid [40].

[137] *Fighting to Learn* (n 43) 37–38.

budgetary constraints, the Department's justification for an extension also highlighted other key reasons for their partial compliance.[138] Firstly, they had faced a number of legal challenges to their procurement processes, including litigation by the LRC on behalf of the CCL concerning unlawful tender processes which resulted in delays in furniture delivery and a considerable waste of money.[139] This spin-off litigation about procurement had a knock-on effect on compliance as furniture which had been ordered and paid for sat in warehouses rather than reaching the schools that desperately needed them.[140] A second, but related, reason for the delays in furniture delivery was that the repeated irregular procurement processes resulted in the National Treasury assuming control of procurement, leaving the Department in a position of being unable to purchase furniture.[141]

The LRC notes in *Fighting to Learn* that a significant number of desks and chairs began to be delivered in the months following Goosen J's judgment.[142] After a tortuous legal journey, the promise of systemic relief finally began to produce some tangible results. The serialised litigation in *Madzodzo* traces a gradual refinement of the two-track remedy through improved Institutional Responsiveness and Institutional Complementarity. As a first step, auditing and reporting requirements enabled non-compliance to be quickly detected and the debilitating effects of the Department's incompetence to be exposed. As a second step, therefore, the remedial plan shifted to a more coercive remedial mode, taking away the responsibility of the audit from the Department and allocating this task to an independent auditor. However, this novel

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138 ibid 38.

139 ibid.

140 ibid.

141 ibid.

142 ibid.

mechanism of an independent auditor proved insufficient to achieve full compliance, as it became increasingly clear that the Department's non-compliance was tinged with intransigence. As a final step, Goosen J carefully recalibrated the remedial plan in light of this combined incompetence and intransigence, eventually inducing compliance through increased transparency and co-operative problem-solving. *Madzodzo* therefore achieved compliance through a patient refinement of the remedial plan, while still relying on the Department to ultimately implement systemic relief. In *Centre for Child Law* and *Linkside*, however, the LRC developed an innovative remedial mechanism that sought to bypass reliance on the Department altogether. Section V traces the pioneering but precarious route to this peak of remedial innovation.

V. Non-Compliance as a Catalyst for Remedial Innovation: *Centre for Child Law* and *Linkside*

A. Anticipating Settlement

1. Compromised Teacher Post-Provisioning Processes

The final stream of education litigation considered in this case study concerns another vital aspect of the state's positive duty to fulfil the right to education – the allocation and payment of teachers. This serialised litigation began with *Centre for Child Law* and culminated in the ground-breaking class action of *Linkside*. By late 2012, when the LRC began litigation in *Centre for Child Law*, there were over 4,000 vacant teaching posts but also over 7,000 excess teachers in the Eastern Cape.[143] This simultaneous shortage and

[143] *Ready to Learn* (n 43) 65.

surplus of teachers in the province revealed that the Department had significant difficulty complying with the national teacher post-provisioning norms that determine how many teachers should be employed and where they should be placed. The excess number of teachers holding posts at certain schools had the obvious consequence that the Department was overspending on teacher salaries. More detrimental, however, were the knock-on effects of the Department's failure to appoint teachers to the vacant posts, as many schools were left in crisis. Schools with severe teacher shortages resorted to appointing temporary teachers at their own expense or, if they were unable to afford it, they relied on emergency donations from parents to scrape together meagre teacher salaries.[144] The LRC notes that there were some cases where teachers received as little as a bus fare for payment or were simply unpaid for months on end.[145] This in turn put financial strain on the ability of schools to pay for other basic provisions such as nutrition programmes, textbooks, stationery and scholar transport.[146] In short, the systemic shortage of teachers was devastating for the prospects of children trapped within a provincial education system already in crisis, further undermining their constitutional right to education.

A study by Martin Gustafsson on teacher supply problems in South Africa finds that there were a striking number of 'misplaced' teachers in the Eastern Cape in 2013.[147] The Department's inability to respond to the lag between enrolment distribution patterns and teacher distribution patterns[148] can be traced back to two institutional problems,

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144 ibid.

145 ibid 65–66.

146 ibid 66.

147 Gustafsson (n 56) 35.

148 Gustafsson identifies this lag as a key measure of a province's ability to manage post-provisioning processes, pointing out that it should ideally be one year but the Eastern Cape suffers from a four-year lag. See ibid 36.

according to Gustafsson. Firstly, there is a lack of technical capacity in the Department to implement the post-provisioning norms, which coincides with the broader deterioration in capacity of the provincial government between 2009 and 2013.[149] Secondly, Gustafsson diagnoses the significant surplus of teachers as stemming from the Department's inability to 'deal with the politics of teachers not wishing to move from schools with shrinking enrolments'.[150] This problem is particularly illuminating for purposes of this case study, as it speaks to the lack of accountability in the Department as a result of the undue influence exerted by trade unions, and SADTU in particular. The LRC's litigation represents an attempt to break the regulatory capture of the Department by the unions which had compromised post-provisioning processes. The key remedial challenge, as we shall see, was to design a remedy that anticipates the non-compliance that would result from this lack of political will and to ensure that the remedy then leverages the Department's inaction to induce compliance.

In May 2012, the LRC decided litigation had become necessary given that the Department had not substantially responded to any of its numerous requests to address the teacher post-provisioning problem in the Eastern Cape.[151] The LRC therefore filed an application in the Grahamstown High Court on behalf of the CCL and a number of schools who were in crisis as a result of the Department's failure to appoint teachers to vacant posts. The claim was formulated in bold terms, reflecting the LRC's anticipation that the government would continue its trend of settling out of court.[152] This was indeed so, as the Department agreed to all of the substantive terms except one, which

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[149] ibid 37. This relates to the Section 100(1)(b) intervention in which the national DBE assumed the executive responsibilities of the ECDOE.

[150] ibid.

[151] *Ready to Learn* (n 43) 66.

[152] ibid.

concerned the appointment of non-teaching posts.[153] The judgment subsequently handed down by Plasket J in August 2012 ruled in favour of the LRC on the question of non-teaching posts and made the terms of the settlement an order of the court.[154] The relief once again took the form of a two-track remedy reflecting the LRC's combination of individual and institutional clients.

2. Refining the Two-Track Remedy

The individualised track of the remedy in *Centre for Child Law* directed the government to back-pay the salaries of all teachers that had been temporarily appointed from the date they assumed their duties.[155] The design of this individualised track was particularly innovative in preventing the government's past administrative failings from being a barrier to the implementation of individualised relief. This was achieved by the mandatory interdict being accompanied by a novel 'deeming' provision, whereby a teacher who had been duly identified by an SGB to fill a vacant post and had been performing the functions of that post, would be *deemed* to have been appointed as a temporary teacher.[156] This ensured that the government's administrative failure to formally appoint temporary teachers at the recommendation of schools would not prevent those teachers from being paid under the mandatory interdict. In implementing this individualised relief, the onus was on individual schools to provide the Department with details about teachers that should be deemed appointed and therefore paid salaries

[153] ibid.

[154] *Centre for Child Law* (n 5).

[155] ibid [35.4].

[156] ibid [35.5].

as other temporary teachers who had been officially appointed.[157] The government was required to pay the salaries of these teachers within one month of receiving such details from the schools.[158] As discussed below, this early experimentation with a 'deeming' provision was later developed into a more comprehensive remedial mechanism that not only anticipated non-compliance, but leveraged it to achieve the desired relief.

While the individualised track of the remedy sought to provide urgent relief for schools and unpaid teachers in dire financial straits, the systemic track addressed the broader problem of teacher shortages across the province. The systemic track was structured in two stages—immediate temporary relief and later permanent relief. The government was ordered to fill all vacant posts on a *permanent* basis within three months of the court order and, as a stepping stone to achieving this, appoint *temporary* teachers to those vacant posts within one month.[159] The order also directed the government to declare the post establishments for the forthcoming year (2013) and to ensure that these posts were fully funded and teachers were appointed and assume these posts at the start of the school year.[160] This boiled down to a mandatory interdict that the government comply with teacher post-provisioning norms in future.

The two-track remedy was fortified with reporting requirements for tracking the government's compliance with the terms of the court order. The government was required to make a progress report available for inspection at each district office in the province at three points in the timeline set out by the court for the implementation of

157 ibid [35.6.2].

158 ibid [35.6.3].

159 ibid [35.2-3].

160 ibid [35.7-9].

the individualised and systemic tracks of the two-track remedy.[161] The LRC notes that these reporting requirements were 'designed to enable interested parties to inspect the Department's progress as well as facilitate constructive involvement from all sides'.[162] Finally, the remedial order granted the parties advance leave to set the matter down for hearing on reasonable notice.[163]

As in the *Madzodzo* case, these reporting requirements accompanying the two-track remedy in *Centre for Child Law* enabled the LRC to quickly detect the government's non-compliance. The progress reports revealed that the Department had appointed and paid some temporary teachers, but the systemic post-provisioning problem had in fact worsened—with 7,000 surplus teachers and almost 8,500 vacant posts.[164] The Department's non-compliance persisted in spite of having consented to the terms of the court order and in spite of the financial capacity it gained from the provincial legislature having voted for a budget to fund the posts at issue.[165] The LRC's repeated communications with the Department aimed at facilitating compliance also met with no success.[166] This drew attention to the deeper institutional problems underlying the government's inaction. The Department did not rely on any legal defence to justify their non-compliance but instead explained in their progress reports that it was caused by 'a combination of internal inefficiency, incompetence and trade union resistance'.[167] In the face of the institutional inertia generated by these institutional problems, it became clear

161 ibid [35.10].

162 *Ready to Learn* (n 43) 66.

163 *Centre for Child Law* (n 5) [35.11].

164 *Ready to Learn* (n 43) 67.

165 ibid 66.

166 ibid 67.

167 ibid.

that there was little prospect of progress without returning to court with more creative remedial strategies for enforcing the state's positive duty to appoint and pay teachers.

B. Anticipating Non-Compliance with 'Deeming' Provisions

Building on their experimentation with a 'deeming' provision in the first round of litigation in *Centre for Child Law*, the LRC developed a remedial strategy that not only anticipated settlement but also anticipated the non-compliance that would inevitably follow. The strategy was therefore premised on a default of non-compliance but sought to counteract its harmful consequences. This meant that the notice of motion would be crafted 'in anticipation that the Department would likely agree to its terms, and then fail to abide by the court order' but—crucially—that 'the desired result would be achieved if the Department failed to act'.[168] This rationale flowed from a key remedial challenge associated with enforcing positive duties, namely that positive action is required to fulfil rights. Where the government lacks the institutional capacity and political agency to take the positive action necessary for achieving the desired outcome, it is very difficult to craft a remedy that is likely to provide effective relief. This challenge is particularly acute in the context of systemic relief where the scale of the problem is not fully known in advance, as demonstrated by *Mud Schools* and *Madzodzo*.

The relief subsequently designed by the LRC represents an impressive feat in remedial innovation to meet the institutional challenges that had so far thwarted compliance with teacher post-provisioning norms. The remedy was enacted in two phases flowing from two settlements that were reached between the parties. The first phase concerned the appointment and back-pay of temporary teachers. The Department

[168] ibid.

agreed to a list of over 140 named temporary teachers that the LRC had drawn up in consultation with specific schools.[169] These individually identified teachers were formally appointed as temporary teachers in terms of the settlement and the Department was required to back-pay their salaries from the date they assumed their duties.[170] A failure to back-pay these temporary teachers would make the Department liable for ascertainable debt that the LRC could enforce in court by threat of attaching state assets to satisfy the debt.[171] The second phase of the remedy resulted from a settlement in terms of which the named teachers on an agreed list were to be permanently appointed and remunerated. This list of individual teachers did not preclude schools from advertising, interviewing and recommending the appointment of further permanent teachers, and if the Department failed to act on those recommendations, the teachers in question would be *deemed* to be appointed.[172] Moreover, any failure of the Department to pay these permanently appointed teachers was declared in advance to be an ascertainable debt, and therefore subject to the threat of attaching state assets.[173]

The remedial strategy adopted in this two-phase approach sought to provide the same relief as the initial two-track remedy approved by the court in the first *Centre for Child Law* settlement, but it did so through a more creative and careful tailoring of relief to the remedial challenges that had crystallised during the follow-up process. This was achieved through three innovative features: (1) a shift in onus in the enforcement of positive duties; (2) the transposition of a systemic problem into individualised relief; and (3) a dynamic use of remedial mode.

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[169] ibid.

[170] ibid.

[171] ibid.

[172] ibid 68.

[173] ibid.

1. Shifting the Onus in the Enforcement of Positive Duties

Where relief is dependent on the government taking positive steps to comply with court orders, compliance can be easily thwarted by a lack of capacity or political will which leads to inaction. With this remedial challenge in mind, the LRC devised a new remedial strategy that shifted the onus in the enforcement of positive duties. Instead of requiring positive action by the government to appoint and pay teachers, the court-approved remedy was designed to ensure that a *failure* to act would trigger the same result. This shift in the onus was utilised in both phases of the remedial plan. Its operation in the first phase was straightforward as it functioned in relation to payment only: a failure to back-pay temporary teachers made the Department liable for an ascertainable debt. The shift in onus was more nuanced in the second phase, however, because it functioned in relation to appointment as well as payment: firstly, a failure to appoint permanent teachers upon the recommendation of schools resulted in those teachers being *deemed* permanently appointed and—as the second shift in onus—a subsequent failure to pay those permanent teachers was declared in advance to be an ascertainable debt. Through these strategic shifts in onus, the remedy was premised on non-compliance as the government's default response. The remedy was accordingly structured to subvert the effects of the government's anticipated failure to act, with the paradoxical result that positive duties were enforced through inaction rather than positive action. This shift in onus reflects an optimisation of Effective Relief as it left no 'gap' between what the right to education required and what the relief secured, namely the appointment and payment of teachers.

2. Transposing a Systemic Problem into Individualised Relief

For this shift in onus to trigger the desired effect, however, the scope of the remedy had to be narrowed from systemic relief for all schools to individualised relief for select schools.[174] The shift in onus from action to non-action therefore worked in tandem with the transposition of a systemic problem into individualised relief. The identification of specific teachers to be appointed and paid was required for the consequences of the government's failure to act to be clear and contained. A further rationale for individualising relief in this way was to make the debt ascertainable and therefore subject to the threat of attaching state assets to satisfy the debt for non-payment of teacher salaries. Although this narrowed the scope of relief from all schools to select schools, the individualisation of claims was necessary for a measure of systemic relief to be achieved at all.

This reflects a prioritisation of Effective Relief over Systemic Compliance—the scope of relief was sacrificed so that the fullest relief could be secured for a select group of schools. However, while this prioritisation meant it was not legally possible to provide the fullest scope of systemic relief, the remedy nevertheless sought to promote Systemic Compliance to the greatest extent possible in the circumstances. This was achieved by allowing schools to advertise, interview and recommend further teachers for permanent appointment, and the accompanying deeming provision would ensure they would be appointed even if the Department failed to act on schools' recommendations. As a result, systemic relief could be expanded to schools and teachers who were similarly situated to those named on the list of permanent appointments.

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[174] ibid 67.

3. A Dynamic Use of Remedial Mode

The third feature of this innovative remedy was its dynamic use of remedial mode to compel compliance. A creative combination of coercive and reflexive techniques was used to optimise Institutional Responsiveness. The strongly coercive aspects of the remedy were calibrated to address both the lack of political will and the lack of competence that compromised the Department's compliance with teacher post-provisioning norms. Firstly, the shift in onus broke the political bind that had long compromised the Department's compliance with teacher post-provisioning norms. Recognising that the government lacked the political will to move surplus teachers to take up vacant posts in other schools, the shift in onus meant that any undue influence exercised by trade unions would not prevent teachers from being appointed. Secondly, the remedy sought to compel compliance with the threat of attaching state assets to satisfy the ascertainable debts owed to unpaid teachers. As discussed below, this threat proved highly effective when the LRC issued a 14-day ultimatum for attaching the movable assets of senior officials in the Department, and the outstanding teacher salaries were promptly paid.[175]

These robust prophylactic measures were not one-dimensionally coercive, however. Instead, they were offset by allowing for the recalibration of relief over time as the scale of the teacher post-provisioning problem became better known and by promoting the continued involvement of both the Department and schools. The flexibility for recalibrating systemic relief over time was facilitated by the provision allowing schools to advertise, interview and recommend further teachers for permanent appointment. While the deeming provision ensured that the appointment of these

[175] Writ of Execution, *Centre for Child Law and Others v Minister of Basic Education and Others* (ECG) case no 1749/2012 (6 August 2013) (*Centre for Child Law* Writ of Execution). See further *Fighting to Learn* (n 43) 54.

teachers would not be thwarted by administrative failures, the Department still retained its agency to act positively by appointing them formally. Similarly, the competence of the government was respected by the fact that the Department would retain its power to terminate teacher contracts although, crucially, it would be required to act positively to do so. These subtle incentives sought to induce compliance by giving the Department the opportunity to pre-empt the operation of the deeming provision.

4. Explicit Judicial Approval

This shift in onus that underlies the 'deeming' provision was utilised again in the third phase of the teacher post-provisioning litigation, the *Linkside* class action.[176] Roberson J's judgment in *Linkside* gave explicit approval to the use of 'deeming' provisions and her remedial order included a declaration that the suitably qualified teachers listed by the applicant schools were deemed to be permanently appointed.[177] Roberson J describes this deemed appointment of teachers as 'the heart of the matter' because it sparked disagreement as to how much leeway the court should continue to give to the government when there is an ongoing violation of rights.[178] On the one hand, the government argued that it was currently in negotiations with the teacher trade unions (who were respondents to the litigation, but against whom no relief was sought) about moving teachers in excess at various schools to the vacant posts at other schools.[179] It resisted the deemed appointment of teachers on the basis that it 'compromised and

[176] *Linkside* (n 1).

[177] ibid [1.2].

[178] ibid [22].

[179] ibid [7].

derailed the implementation of the management plan flowing from the Collective Agreement' to be reached between the Department and the teacher trade unions.[180] On the other hand, the LRC argued for the court to step in given the 'slow and incomplete attempts by the Department to move these excess educators' and the perpetual delays in reaching a Collective Agreement that would be only the first step towards achieving such reallocations.[181]

Roberson J defended the deeming provision on the basis that the provision of substantive relief should take precedence over the process of collective bargaining. In support of her argument, Roberson J referred to the Constitutional Court's holding in *Ermelo* that

> the ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.[182]

By granting the deeming provision, Roberson J prioritises Effective Relief and Institutional Responsiveness over Institutional Complementarity. She found that the government's persistent non-compliance in spite of 'the leeway afforded to it in previous more open-ended orders'[183] means that 'the decision...should not be left to the designated functionary'.[184] She gives weighty consideration to the fact that the rights-holders who are affected by the state's failure to appoint and pay teachers are the poorest and most vulnerable children.[185] Relying on these reasons, Roberson J concludes that 'the ongoing

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[180] ibid [11].

[181] ibid [8]-[9].

[182] *Ermelo* (n 40) [97] (Moseneke DCJ).

[183] *Linkside* (n 1) [24].

[184] ibid [26].

[185] ibid [25].

violation of the right to basic education constitutes exceptional circumstances' that call for the court to 'substitute its own plan of action for that of the Department'.[186]

This bold decision comes after a carefully reasoned justification of the deeming provision as lying within the scope of the court's appropriate remedial jurisdiction, but it undoubtedly lies nearer the outer limit of those remedial powers. Not only does the remedy set in motion a very detailed, specific plan for executing administrative functions that are normally undertaken by the executive, but the shift in onus tolerates the continuing failure of the Department to act positively to comply with its positive duty. There is certainly room for principled disagreement with Roberson J in this regard, as an institutional division of constitutional labour which is premised on relief being secured *in spite of* the government's continuing disregard for rights is surely far from optimal. If courts 'speak' through their remedies, then this approval of the deeming provision sends a conflicted message about the role of the state in promoting positive freedom.

C. The Opt-In Class Action and Appointment of a Claims Administrator

1. The Opt-In Class Action

While the creative shift in onus represented a major breakthrough in responding to the government's continued failure to appoint and pay teachers, the narrower scope of relief meant that many similarly situated public schools did not benefit from the remedy. Recognising the need to scale up relief to all affected public schools in the province, the LRC decided to pursue a further round of litigation that experimented with an opt-in

[186] ibid [26].

class action as a route to optimising Systemic Compliance.[187] In arguing for the certification of a class action, the LRC clearly articulated its purpose in fully capturing the systemic implications of state's failure to appoint and pay teachers:

> It is submitted that, in the absence of a class action mechanism, the claims of schools other than the applicants are unlikely to be enforced. Individual schools are unlikely to secure legal representation to bring their own claims for appointment and payment of educators. Each individual's claim is too small to justify litigation to enforce it. A class action is not only the most appropriate means to determine the claims, it is the only way to do so.[188]

The *Linkside* opt-in class action was certified in March 2014, becoming the first class action of its kind in South Africa.[189] It offered an opening for all public schools in the Eastern Cape affected by the government's failure to appoint and pay teachers to join the proceedings and thereby receive relief. While 32 schools initially approached the court requesting vacant permanent posts to be filled and a reimbursement of the R25 million they had paid in teacher salaries, this number rose to 90 schools once the opt-in class action was certified and advertised.[190]

While the certification of the opt-in class action was a promising start to securing systemic relief, the government was still dragging its feet with respect to appointing permanent teachers to vacant posts and reimbursing the 32 schools for the ascertainable debt that had already been established. In September 2014, the LRC therefore gave the Department a 14-day ultimatum to make these appointments and payments, after which time the LRC would issue a writ to seize state assets to satisfy the debts.[191] This proved highly successful, as the payments were made within days of attaching the movable assets

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[187] *Fighting to Learn* (n 43) 54.

[188] Sarah Sephton Founding Affidavit, *Linkside* (25 November 2013) [149].

[189] For further reflection on the significance of *Linkside* as a class action in public interest litigation, see James Rooney, 'Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives' (2017) 33 South African Journal on Human Rights 406.

[190] *Fighting to Learn* (n 43) 54.

[191] *Centre for Child Law* Writ of Execution (n 175). See further *Fighting to Learn* (n 43) 54.

of the Minister of Basic Education and top officials in the ECDOE.[192] The prospect of the government implementing similar relief in relation to the schools that had opted in to the class action remained poor, however, and the LRC identified the need to pre-empt non-compliance and its detrimental effect on those schools. This led to a further remedial innovation to strengthen the opt-in class action as a systemic remedy, namely the appointment of a claims administrator to oversee the implementation of the court order, which included the payment of R81 million in outstanding salaries to the 90 applicant schools.[193]

2. The Appointment of a Claims Administrator

An important aspect of remedial innovation in *Linkside* concerned the payment and administration of outstanding teacher salaries. Roberson J declared that each of the specific amounts paid by the class member schools to teachers occupying vacant posts constituted a debt against the state.[194] Given the Department's poor track record in following through with these reimbursements, however, she recognised that this declaration on its own was insufficient.[195] Thus, to avoid the need for the LRC to issue a writ to seize the state's assets in satisfaction of the debts, Roberson J granted the LRC's request for the appointment of a claims administrator to oversee the implementation of the order. The government was accordingly directed to appoint a firm of registered chartered accountants 'to distribute the amounts payable to individual schools as

192 *Fighting to Learn* (n 43) 54.

193 ibid.

194 *Linkside* (n 1) [1.1.1].

195 ibid [20].

members of the class and advise the court of their identity'.[196] The Department was required to pay R81 million to the claims administrators so that they could verify each class member's claim and disburse payments according their respective entitlements.[197]

Roberson J justified the appointment of a claims administrator on the basis of the Supreme Court of Appeal's reference to court-appointed supervisors in *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality*[198] as a remedial innovation that courts should consider in future.[199] The relevant passage from *Meadow Glen* is worth quoting in full as it fleshes out the remedial challenges that a claims administrator or special master may be well suited to address:

> Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order. There is considerable experience in the United States of America with orders of this nature arising from the decision in *Brown v Board of Education* and the federal court supervised process of desegregating schools in that country. The Constitutional Court referred to it with approval in the *TAC (No 2)* case. Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders.[200]

Having relied on this passage as authority for the appointment of a claims administrator being within the court's remedial powers, Roberson J then argued for it being the optimal remedial mechanism in *Linkside*.[201] She pointed to the government's persistent non-compliance and the added complexity of the class action as evidence for

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196 ibid [1.1.3].

197 ibid.

198 *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA).

199 *Linkside* (n 1) [19].

200 *Meadow Glen* (n 198) [35] (Wallis JA and Schoeman AJA).

201 *Linkside* (n 1) [20].

the ‘strong likelihood that administrative problems will be encountered in the implementation of payment by the Department’.[202] She therefore held that ‘an efficient and independently accountable method of payment is essential’ to providing just and equitable relief.[203] In prioritising the effective administration of payments, Roberson J dismissed the government’s objection about the cost implications of appointing a firm of chartered accountants, recognising that ‘their charges will not be insubstantial but it is unlikely they will make a significant inroad into the budget of the Department in its overall extent’.[204] Similarly, the Department’s concern about delays caused by the prescribed procurement procedures was rejected on the ground that ‘this would be a situation of urgency or emergency justifying a deviation from the competitive procedure’ for procurement.[205] In seeking the best institutional division of constitutional labour, Roberson J was not distracted by the institutional friction that it would entail. Rather, given the factual constraints which compromised the Department’s capacity to administer the payments, she sought to ensure their weak institutional functioning was strengthened through the support of an independent claims administrator.

Conclusion

Each stream of serialised litigation covered in this case study charts a similar trajectory of remedial experimentation and refinement through an extended remedial process. Through my thick description of their individual stories of serial settlement and serial

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[202] ibid.

[203] ibid.

[204] ibid [21].

[205] *Linkside* (n 1) [21].

non-compliance, the case study offered a detailed insight into the way that greater optimisation was achieved through an iterative remedial process. It is only through detailed attention to the multi-faceted challenge of achieving full compliance that the contextualised application of my remedial principles can be evaluated, and thus the feat of greater optimisation more fully appreciated. An even richer narrative emerges when reading the three stories of serial settlement and serial non-compliance as a trilogy. The structure of my case study enabled this longer narrative arc to be traced by foregrounding the particular contribution each case made to the overarching trajectory of remedial development.

The *Mud Schools* case piloted the use of a two-track remedy to structure relief. It demonstrated how individualised relief need not be pitted against systemic relief as competing priorities but can rather complement each other in a synergistic optimisation of both Effective Relief and Systemic Compliance. In pioneering this innovative strategy, however, the *Mud Schools* case helpfully brought to light the multi-faceted challenge of ascertaining and implementing systemic relief. While ASIDI secured a sizeable budgetary commitment for replacing all mud schools in the province, the scale of the systemic problem was not even known by the Department itself. Not least because of this initial obstacle to implementation, the Department lacked capacity to formulate and carry out a comprehensive plan for systemic infrastructure improvements.

Learning from these shortcomings, *Madzodzo* refined the two-track remedy through auditing and reporting requirements. First, the remedial plan provided a detailed blueprint for the Department to follow in undertaking a systematic audit of the province's school furniture needs. Second, extensive reporting requirements were included to enable the government's progress to be monitored. These reporting requirements did not prevent non-compliance but served a valuable diagnostic function in quickly detecting non-compliance. The unreliability of the government's own audit prompted the appointment of an independent auditor. This adjusted institutional division of constitutional labour injected much-needed accountability and capacity into the auditing process, but this success shifted attention to the underlying intransigence which was stalling the delivery phase of the implementation. This attracted a strong rebuke from Goosen J, who recalibrated the remedial plan to optimise Institutional Responsiveness. This was achieved by combining coercive deadlines with a more reflexive remedial mechanism that allowed for extensions to be justified through transparent, co-operative problem-solving.

While *Madzodzo* demonstrates the rewards of patiently refining a remedial plan to eventually secure the government's compliance, the third strand of LRC litigation showcases a far more radical remedial intervention that bypassed reliance on the Department altogether. The experimentation with 'deeming provisions' in *Centre for Child Law* compelled compliance by shifting the onus for enforcing the state's positive duty to appoint teachers. *Linkside* then expanded the application of deeming provisions by scaling up relief to similarly situated rights-holders through the ground-breaking use of an opt-in class action. Similarly, while attaching the assets of senior government officials proved a highly effective strategy for coercing the payment of outstanding teacher salaries, reliance on the government to fulfil this task was dispensed with through the appointment of an independent claims administrator in *Linkside*.

Centre for Child Law and *Linkside* undoubtedly represent the culmination of the LRC's steep learning curve in remedial experimentation and refinement. The use of deeming provisions was a truly creative remedial mechanism for overcoming the indomitable institutional inertia that had prevented compliance. *Linkside* broke new ground as the first opt-in class action of its kind in South Africa, forging a sophisticated mechanism for ascertaining systemic relief that speaks to the progress made since the *Mud Schools* case was initiated. Yet these innovations also came at the point when the

LRC was acutely aware of its power to dictate the remedial plan in settlement negotiations with the Department: while settlement came as a surprise in *Mud Schools*, the LRC anticipated it with bold demands in *Madzodzo*, before proactively leveraging settlement in *Centre for Child Law* by crafting a remedy in anticipation of non-compliance. While repeated non-compliance had left few options for fulfilling rights—these were remedial innovations born of necessity—their genesis as court-approved remedies underscore the importance of discretion in scrutinising settlement agreements. In spite of Roberson J's explicit approval of deeming provisions in *Linkside*, there is room for disagreement as to whether this mechanism reflects an appropriate, let alone optimal, institutional division of constitutional labour.

There can be no doubt that deeming provisions hold compelling promise as a remedial mechanism to subvert the harmful consequences of non-compliance, but the shift in onus unsettles our understanding of what is required of the state to fulfil human rights. Instead of mandating the state to take positive action to fulfil rights, relief is premised on the state's continuing failure to act. The right may be realised, but it is dislocated from the state's correlative positive duty. Future research will need to grapple with this dilemma in developing the mechanism of deeming provisions for more generalised application. It suffices here to sound a note of caution against treating this mechanism as a panacea for the paradigm remedial puzzle posed by positive duties. My contextualised evaluation has revealed how highly effective it can be in breaking a cycle of persistent non-compliance. Yet by tolerating—indeed, even relying on—the government's continuing failure to fulfil its positive duties in the process, this is surely a pyrrhic victory for the rule of law.

CHAPTER SEVEN

CONCLUSION

This thesis has advanced a constructive project by bringing 'the claims of a resistant, unruly [remedial] reality' to bear on the ideals of remedial theory.[1] I have bridged remedial theory and practice by following a dialectical research process in which the insights of one perspective are allowed to permeate and shape the other in an 'open-ended conversation between [the] researcher and her evidence'.[2] This finds concrete form in the two-part structure of the thesis. Part I developed a theoretical account of discretionary remedial power that is infused with a pragmatic dimension, while Part II drew on this account to enhance the explanatory power of my case study material and so illuminate its potential to contribute to the development of remedial theory.

I. Infusing Remedial Theory with a Pragmatic Dimension

Part I developed a court-focused account of the optimal exercise of discretionary remedial power (Chapter Four) that is attentive to the practical challenges (Chapter Two) and the responsive nature (Chapter Three) of the court's task in remedying breaches of the state's positive duties.

Chapter Two underscored both the difficulty and the importance of the court's remedial role by clarifying the relationship between rights, remedies and positive duties. I first drew attention to the challenges that courts grapple with through my

[1] Paul Gerwitz, 'Remedies and Resistance' (1983) 92 Yale Law Journal 585, 587.

[2] John Gerring, *Case Study Research: Principles and Practice* (CUP 2007) 72.

characterisation of the 'paradigm remedial puzzle' posed by positive duties. This requires the court's continued involvement in an extended remedial process to (1) ascertain systemic relief and (2) promote accountability for compliance. The second half of the chapter then brought these remedial challenges to bear on the relationship between rights and remedies. Building on the seminal work of Gerwitz and Levinson, I exposed the pervasive discourse of 'rights essentialism' as a fiction that belies a more complex reality in which rights and remedies are 'inextricably intertwined'.[3] I drew out the role of remedial discretion in mediating this reciprocal relationship between rights and remedies, as discretion makes it 'inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy'.[4] Given the risk that the remedial challenges posed by positive duties may constrain judicial interpretation of the correlative right that has been breached, the chapter concluded by underscoring the importance of remedies for the *full* realisation of rights.

Chapter Three explored the central tension that characterises the exercise of discretionary remedial power. On the one hand, there is a risk of judicial overreach where the court is insufficiently responsive to the limits of its democratic legitimacy, institutional competence and judicial independence which should constrain the exercise of discretionary remedial power. On the other hand, there is an equally significant but often overlooked risk that rights are under-realised because the court fails to satisfy the constitutional imperative to enforce the state's positive duties. In navigating this central tension, I argued that courts are not walking a judicial tightrope but are instead faced with a range of remedial possibilities within the appropriate scope of their discretionary remedial power. The responsive nature of the court's remedial role was further

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[3] Daryl J Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 Columbia Law Review 857, 858.

[4] Gerwitz (n 1) 679.

highlighted by my typology of discretionary remedial power which captures the diversity and fluidity of forms that its exercise can take. This pointed to the need for principled remedial decision-making to guide the exercise of discretion.

Chapter Four met this need by providing a framework for optimising remedial decision-making, thus shifting focus from the *appropriate* to the *optimal* exercise of discretionary remedial power. Benefitting from the analytical clarity of Alexy's understanding of principles as 'optimisation requirements',[5] I argued that a sound exercise of remedial discretion should involve the prioritisation and optimisation of four remedial principles: (a) the Principle of Effective Relief; (b) the Principle of Systemic Compliance; (c) the Principle of Institutional Responsiveness; and (d) the Principle of Institutional Complementarity. The best remedy in a particular case will not only reflect the conditional order of preference assigned to the four principles when they are in tension, but also seek to optimise *all* four principles as far as possible. The chapter closed by arguing that this imperative of *optimisation* calls for greater remedial *innovation*.

II. Contributing to the Development of Remedial Theory

Part II used this framework of remedial principles to evaluate the potential of specific remedial innovations for optimising the exercise of discretionary remedial power. My two case studies featured pioneering remedial developments that responded to the paradigm remedial puzzle posed by positive duties. They were strategically selected in light of (1) their complementary but under-explored jurisdictional pairing; (2) their thematic unity in sharing a focus on the right to education; and (3) their serialised litigation which charts a clear trajectory of remedial development.

[5] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2010) 47.

The CFE litigation covered in Chapter Five engages head-on with one of the most paradigmatically polycentric remedial challenges associated with enforcing the state's positive duties in human rights—how to translate a constitutional standard into a budgetary figure. The case study demonstrated how courts can not only navigate a politically charged, highly polycentric issue like education financing without overreaching the appropriate limits of the judicial role, but can in fact discharge their constitutional mandate with an optimal exercise of discretionary remedial power. *CFE II* featured a court-prompted remedy that set clear constitutional parameters for reforming the education financing system but gave the other branches of government the first opportunity to 'cash out' what this required in budgetary terms. Non-compliance prompted the remedial escalation of a court-imposed remedy in *CFE IIIa*, as the trial court appointed an independent panel of referees to provide recommendations on bringing the education financing system into constitutional compliance. The referees' scrutiny of the parties' compliance plans to find a point of relative convergence was an innovative mechanism to break the political bind that had prevented reform. They drew on a wide range of stakeholders and experts to evaluate the soundness of the methods used in the various costing-out studies, thus exposing some of the flaws in the state's costing-out study which had been used to drive down costs. In spite of the Court of Appeals' disappointing retreat into deference in *CFE IIIc*, the CFE case study demonstrates how costing-out studies can ensure budgeting is transparent and tied to clear constitutional standards.

The LRC litigation covered in Chapter Six engages with the multi-faced challenge of securing full compliance with the provision of adequate infrastructure and basic resources to public schools. The remedial challenges went beyond budgeting, as the Department lacked capacity to spend the allocated budget through a coordinated plan for implementing systemic relief. The two-track remedy piloted in *Mud Schools* demonstrated how individualised relief and systemic relief can be structured in a complementary, mutually reinforcing way rather than as a trade-off between competing priorities. *Madzodzo* refined the use of reporting requirements to strengthen accountability for compliance, and increased the transparency of the implementation process through robust judicial supervision over strict deadlines and the approval of extensions. The appointment of an independent auditor in *Madzodzo* and a claims administrator in the *Linkside* class action are pioneering examples of court-appointed delegates in South African jurisprudence, and met the need for independent, competent expertise in the context of debilitating institutional dysfunction. Finally, *Centre for Child Law* and *Linkside* experimented with what is arguably the boldest remedial intervention granted by a South African court—the use of deeming provisions to anticipate and subvert the harmful consequences of non-compliance.

My case studies offered a contextualised evaluation of these remedial innovations to illuminate their potential for addressing the paradigm remedial puzzle posed by positive duties. Using my framework of remedial principles as 'optimisation requirements', my evaluation achieved one level of abstraction in translating these remedial innovations from their highly-specific, concrete application in particular litigation to their scope for more generalised application. This preliminary step points to their compelling promise for optimising the exercise of discretionary remedial power in response to the remedial challenges posed by positive duties, but it is beyond the scope of this project to flesh out what form their more generalised application could take. However, the detailed, contextualised attention I have given to the way that these remedial innovations were developed over the course of serialised litigation provides a sound foundation for this future work of assessing how they could be adapted for use in other areas of litigation or be transplanted to other jurisdictions.

Recent developments in both US state-level and South African constitutional jurisprudence gesture towards the importance of this avenue for future research. In the US, costing-out studies have become increasingly common in education adequacy litigation and have consequently attracted considerable academic interest.[6] This critical attention has refined the methodology used in costing-out studies, but it has also become a new battle ground for the debate over the court's role in education financing reform.[7] The familiar concerns of democratic legitimacy, institutional competence and judicial independence are cited in criticisms of the court's reliance on, and oversight over, costing-out studies. On the other hand, costing-out studies have assisted the court in discharging its constitutional mandate to enforce the state's positive duty to provide an adequate education. The CFE litigation offers a powerful illustration of the high stakes involved in this debate. *CFE IIIa* demonstrates how judicial scrutiny of costing-out studies can add much-needed transparency to a budgeting process that is susceptible to improper political influences, and offers an evidence-based, collaborative process for achieving compliance that can be sustained through the regular repetition of costing-out studies. In stark contrast, *CFE IIIc* demonstrates the high cost—quite literally—of judicial withdrawal from scrutinising the costing-out process. Its effects were felt in the first stage of the *NYSER* compliance litigation, as the Court of Appeals had left no basis

[6] There have been more than 100 adequacy cost studies in over 40 states over the last 25 years. See Michael A Rebell and others, 'A New Constitutional Cost Methodology for Determining the Actual Cost of a Sound Basic Education' (41st Annual Conference of the Association for Education Finance and Policy, Denver, September 2016) 1 <www.centerforeducationalequity.org/publications/safeguarding-students-educational-rights/> accessed 30 November 2018.

[7] For an example of contrasting views, see the different arguments advanced by Rebell and Hanushek: Michael A Rebell, 'Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies' (2007) 109 Teachers College Record 1303; Michael A Rebell, 'Adequacy Cost Studies: Perspectives on the State of the Art' (2006) 1 Education Finance and Policy 465; Eric Alan Hanushek, 'Science Violated: Spending Projections and the "Costing-Out" of an Adequate Education' in Eric Alan Hanushek (ed), *Courting Failure: How School Finance Lawsuits Exploit Judges Good Intentions and Harm Our Children* (HIP 2006); Eric A Hanushek, 'Pseudo-Science and a Sound Basic Education: Vodoo Statistics in New York' (2005) 4 Education Next 67.

for a challenge to the funding freeze and budget cuts which followed the failed implementation of the Budget and Reform Act of 2007. Indeed, the Court of Appeals in *CFE IIIc* had left nothing for the government to comply with. These high stakes underscore the importance of further research on the judicial role in costing-out studies, particularly as the new 'wave' of compliance litigation gathers momentum in the continuing struggle for equity in education financing.[8] A more exploratory line of future enquiry lies in the potential for costing-out studies to find wider application beyond the setting of education financing and even US state constitutional litigation. Costing-out studies open up an optimal 'third way' for courts to both insist on budgets that are adequate to fulfil rights on a systemic level and draw on the comparative institutional strengths of the other branches of government through collaborative, deliberative problem-solving.

The nascent use of court-appointed delegates in recent South African constitutional jurisprudence underscores the relevance, even the urgency, of further theoretical reflection on the remedial innovations featured in the LRC litigation. The resort to an independent auditor in *Madzodzo* has already been cited and adapted for use by the South African Constitutional Court in *Black Sash v Minister of Social Development.*[9] In spite of characterising the remedy as 'exceptional', Froneman J cited *Madzodzo* as authority without providing any extensive account of this new remedial mechanism.[10] In follow-up litigation to *Black Sash*, the Constitutional Court issued a personal costs order against the Minister of Social Development on the basis of the finding by a court-

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[8] See further Michael A Rebell, *Courts and Kids: Pursuing Educational Equity Through the State Courts (2017 Supplement)* (UCP 2009) 10–13 <www.press.uchicago.edu/ucp/books/book/chicago/C/bo8212990.html> accessed 30 November 2018.

[9] *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) (*Black Sash*).

[10] ibid [51] (Froneman J).

appointed referee that she acted in bad faith when withholding a full disclosure of her conduct to the court.[11] In a similarly ground-breaking development, the Land Claims Court drew on comparative experience in the US in appointing a special master to provide administrative support to the government in processing the backlog of land tenant claims.[12] These specific developments in South African jurisprudence speak to a broader trend in which courts are increasingly confronted by persistent non-compliance by the government in implementing systemic relief. While non-compliance with court orders has by no means ever been a rarity,[13] accountability for compliance has emerged as a strong theme in recent Constitutional Court decisions.[14] In the last three years, non-compliance with court orders has strained institutional comity in the context of corruption and abuse of state power,[15] institutional dysfunction[16] and disregard for the rule of law.[17] This spate of recent cases has prompted the Constitutional Court to shift gear in its exercise of discretionary remedial power.[18] In the search for creative remedial

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[11] *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 (9) BCLR 1089 (CC); *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development* [2018] ZACC 36 (CC).

[12] *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2017 (4) SA 422 (LCC).

[13] See, for example, *Nyathi v MEC for the Department of Health, Gauteng* 2008 (5) SA 94 (CC); *N v Government of South Africa (No 3)* 2006 (6) SA 575 (D); *City of Cape Town v Rudolph* 2004 (5) SA 39 (C); *Kate v MEC for the Department of Welfare, Eastern Cape* [2004] ZAECHC 25; *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T).

[14] See Stu Woolman, 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect That Brought Down a President' (2018) 8 Constitutional Court Review 155.

[15] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC); *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC); *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC); *South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA).

[16] *Black Sash* (n 9); *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC).

[17] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP); *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA).

[18] For an analysis of the Court's recent use of structural interdicts, see Sue-Mari Viljoen and Saul Porsche Makama, 'Structural Relief - A Context-Sensitive Approach' (2018) 34 South African Journal on Human Rights 209.

strategies, it is likely that the bolder remedial interventions in *Centre for Child Law* and *Linkside* will catch the attention of the courts. Yet while 'deeming' provisions offer a truly novel mechanism for overcoming non-compliance, further theoretical reflection is required as to the significance of achieving systemic relief through a reliance on the state's continuing failure to fulfil its positive duties.

III. Optimisation through Remedial Innovation

My contextualised evaluation of the specific remedies featured in Part II reveals that these innovations were the culmination of a longer trajectory of remedial development. By tracing this development through the serialised progression of litigation, both the difficulty and the ingenuity of these remedial feats can be more fully appreciated. They were not simply new remedial strategies, but truly creative and resourceful responses to seemingly insurmountable remedial challenges. Their significance as remedial innovations is due not simply to the fact that they were forged *in spite of* these remedial challenges, but rather that they were forged *because of* them. Therein lies their potential for wider application in addressing the paradigm remedial puzzle posed by positive duties. They illuminate how courts can optimise their exercise of discretionary remedial power in response to seemingly intractable remedial challenges. These remedial feats in Part II therefore bear out my theoretical argument developed in Part I, offering a practical demonstration of how the exercise of discretionary remedial power can be optimised through remedial innovation.

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