

Study Unit 8:

Remedies

- Objectives:
 - Define + compare remedies for public + private violations of rights
 - Explain purpose of constitutional remedies + different types of remedies available in cases of violations of FR
 - Discuss approach followed by courts in granting remedies
 - Distinguish between declarations of invalidity of unconstitutional law or conduct + other constitutional remedies
 - Assist persons in seeking remedies when their rights have been infringed

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- **Constitutional remedies (CR) and the application of the BOR**
 - CRs flow from direct application of BOR
 - Ordinary remedies flow from indirect application of BOR
 - Generally ordinary remedies must be exhausted before constitutional relief sought (indirect application to be considered before direct application)
- **Remedies and standing**
 - Person must have standing before competent court before being eligible for CR
 - To claim CR person must allege
 - His/Her FR has been violated/threatened
 - He/She has standing before competent court or falls amongst persons listed in s38
 - Courts adopt broad approach to standing (Requirement of sufficient interest not significant obstacle)
- **Remedies and jurisdiction**
 - CRs are a matter of jurisdiction (can only be granted by court empowered to do so by Cons)
 - Cons limits subject matter + remedial competence of some courts Ex. Remedies listed in s172
 - Promotion of Equality and Prohibition of Unfair Discrimination Act establishes equality courts (form of Magistrates Court) which has extended jurisdiction
- **Remedies, interpretation and Limitation**
 - In *Sanderson v Attorney-General Eastern Cape*:
 - Interpretation + Limitation clauses must be investigated before granting a remedy, because
 - Court's wide discretion to fashion "appropriate" remedy may mean it is not as deterred from finding a violation of the right as it would have been if it's scope was more narrow (It's flexibility in providing remedies may affect it's understanding of the right)
- **Invalidity of unconstitutional law/conduct and Cons remedies**
 - Purpose of CRs
 - CRs vindicate the Cons and deters future infringements
 - Violation of rights harm not only individual but whole society, as impedes Constitution's objective of creating just + democratic society
 - Difference between invalidity of unconstitutional law/conduct and Cons remedies
 - Supremacy clause (s2) invalidates law/conduct inconsistent with Cons - invalidity flows from inconsistency) - *Fose v Minister of Safety and security*
 - **Declaration** of invalidity = Remedy
 - Declaration of invalidity is not discretionary remedy - competent court must declare unconstitutional law/conduct invalid
 - s172 provides that in addition to declaration of invalidity, court may make any order which is just + equitable (s38 also provides for "appropriate relief")
 - Declaration of invalidity is attempt to "synchronise the real world with the ideal construct of a constitutional world created in the image of the supremacy clause" - *Fose*
 - DOI as remedy sometimes not enough:
 - Positive action might be required in form of mandamus or structural interdict
 - In private violations may not constitute "appropriate relief" (s38)

- General rule is that where target of remedy is **private or state conduct** – source of **remedy will be found in ordinary law** (legislation, common law), Where law itself challenged remedy will be derived from Cons
- DOI concerns state conduct + has effects *erga omnes*
- Other remedies have effects *egra partes*
- Three major types of **CRs**
 - **Declarations of invalidity**
 - **Prohibitory + Mandatory interdicts**
 - **Awards of constitutional damages**
- Appropriate relief and the flexible approach to Cons remedies
 - Courts developed flexible approach to CRs – In *Fose* held that courts must decide on appropriate relief in any particular circumstance as Cons does not itemise specific types of relief
 - Although *s172 + 8(3)* contains instructions on approach to be taken when granting remedies, *s38* sanctions flexible approach (*Sanderson*)
 - *s172* recognises that:
 - Court must consider effects of it's order on parties + society as a whole, therefore permitting orders of severance + reading in, limiting retrospective effects of orders + suspending orders of invalidity
- Other factors (apart from purpose) relevant to awarding of CRs
 - **Effectiveness** of remedies/relief
 - *Hoffmann*: Held that instatement is:
 - “Basic element of appropriate relief ” where prospective employee is denied employment for unconstitutional reasons (Had HIV)
 - “Strikes effectively at source of unfair discrimination”
 - Expression of general rule that wronged person must be placed in same position as he would have been but for
 - **Effective relief not only to successful litigant**, but all similarly situated people
 - *Gay + Lesbian Equality*: “Constitutional cases has wider public dimension. The bell tolls for everyone”
 - **Separation of Powers**
 - Court owes respect to legislature – deference involves restraint by courts in not trespassing onto part of legislative field reserved by Cons for legislature (*Gay + Lesbian Equality*)
 - **Identity of violator**, whether **public or private** person
 - Deterrent effect of remedy may differ
 - **Nature of violations** (may be systemic or isolated)
 - Systemic (general) violations require structural remedies
 - **Consequences** of violations on victim
 - Ex. Violations of rights resulting in imprisonment should not be tolerated
 - **Victim responsibility**
 - Ex. In *Sanderson* responsibility of accused for delay in criminal trail had impact in rights-defining stage of analyses (Since X caused the delay he was not allowed to rely on right to have trail begin + conclude without reasonable delay)
 - **Possibility of successful execution** of court's order
 - Remedy must not be vague or imprecise
 - Consideration must be given to amount of time to be given to comply with order

- CRs + other forms of relief
 - Remedies may be found in Legislation, Common law, Constitution
 - **Constitutional remedies include:**
 - i. **Declaration of invalidity**
 - General principles:
 - DOI flows from finding of inconsistency between law and Constitution (also applies to conduct of person/institution bound by Cons)
 - DOI only concerns provisions in law which are unconstitutional
 - Any party to litigation may motivate for granting of remedy other than straightforward DOI
 - DOI may be made by CC;HC;SCA regarding all legislation + conduct HOWEVER, DOI relating to:
 - Act of parliament
 - Provincial Law
 - Conduct of President
 - ➔ Need be **issued or confirmed by CC** to have force + effect (temporary relief may be granted pending confirmation)
 - ➔ Courts with jurisdiction to consider constitutionality of laws must consider guidelines of *s172(1)*
 - (In *Gay + Lesbian Equality*) When court strikes down or reads into statute, issue not necessarily closed, Legislature:
 - May amend statute
 - May, within limits of Cons, undo court's order
 - Courts prefer narrow rulings in constitutional cases – do not wish to restrict legislature's ability to reform law (thus violating separation of powers)
 - Controlling impact of DOI
 - **Severance**
 - *s172(1)(a)* holds that law/conduct must be declared invalid to extent of its inconsistency with Cons – Requires:
 - ➔ Court to declare invalid + strike down particular section/subsection while leaving rest of law intact
 - ➔ Sometimes entails severing unconstitutional provisions from within section/subsection while leaving rest of provisions intact
 - CC held in *Coetzee* that severance has 2 requirements:
 - 1) **Must be possible to sever bad from good provisions**, can be done through:
 - a) **Actual severance**
 - Entail striking out of words/phrases from legislative provisions
 - Preferable as leaves statutory provisions with clear language
 - b) **Notional severance**
 - Leaves language of provision intact but subjects it to condition for proper application (used when statute needs to be restricted)
 - Used where presence of provision invalid (invalidity due to omission in text must be cured by reading in) (*Gay + Lesbian Equality*)

2) Remaining provisions must give effect to purpose of law

- Purpose of provision must be determined with reference to statute as a whole - in *Case v minister of safety and security* CC held because unconstitutional overbreadth of statute riddled entire text, severance of 1 or 2 isolated words in *Obscene Pornographic Matter Act* was not viable option – purpose of statute was to impose comprehensive scheme of censorship giving effect to particular moral, cultural and political world view (see *TB pg 202 - 203*)

◦ Reading in

- Differs from “reading down” which aims at interpreting a statute in conformity with the Cons (tries to avoid conflict)
- Reading in is CR granted after court concludes statute is constitutionally invalid
- Permissible under *s172*
- Is a consequence of severance
- Mainly used when inconsistency caused by omission and necessity exists to add words to provision to cure it
- When reading in, court must:
 - ➔ Consider how it will define with sufficient precision how statute ought to be extended
 - ➔ Endeavour to be as faithful as possible to the legislative scheme within constraints of Cons
 - ➔ Avoid granting this remedy where it would result in unsupportable budgetary intrusion
- *Dawood v Ministers of Home Affairs*
 - ➔ Held that where various policy options open to legislature to cure constitutional defects in legislation, not appropriate for court to choose one (by using reading in)
- *Gay and Lesbian Equality*
 - ➔ First time this remedy used
 - ➔ CC extended benefit enjoyed by foreign spouses of SA citizens under Aliens Control Act to same-sex life partners of South Africans, Reading in:
 - Was in keeping with government policy to treat same-sex life partners the same as spouses
 - Had minimal budgetary implications
 - Vindicated rights of gays/lesbians
 - Eradicated discrimination
 - ➔ Reading in necessary because “spouse” cannot reasonably be interpreted to include same-sex life partners
- *S v Manamela*
 - ➔ Reading in not confined to cases of omissions – may also be used as part of process to narrow scope of provision that is unduly invasive of protected right
 - ➔ CC invalidated reverse-onus presumption and read in evidential presumption in its place (leaves impression that despite all rules, courts are in position to reconstruct statutes much as they wish)

- *S v Niemand*
 - CC found provisions allowing habitual criminals to be incarcerated for indefinite period unconstitutional
 - Remedied omission by reading in to *Correctional Services Act* maximum period of incarceration of 15 years
- **Retrospective effects of orders of invalidity**
 - In principle DOI operates retrospectively HOWEVER retrospective invalidation of actions taken in good faith under authority of ostensibly valid legislation could have disruptive results (Ex. Where court invalidates unconstitutional reverse-onus presumption in criminal procedure statute – all convictions previously granted on presumption become invalid)
 - CC may thus limit retrospective effect of DOI under *s172(1)(b)(i)* (permits this in interest of justice)
 - Interim Cons provides that:
 - DOI of pre-constitutional legislation would not have retrospective effect
 - DOI of post-constitutional legislation would have retrospective effect
 - In *Executive Council of Western Cape Legislature* CC held:
 - Reason for above distinction was because Pre-cons laws are inheritance of our past while post-cons laws are product of democratic legislature in constitutional state
 - Where post-cons legislation is unconstitutional special circumstances must exist for court to give validity to actions already performed i.t.o such legislation
 - 96' Cons makes no distinction between pre/post cons legislation (as *s172(1)(b)(i)* assumes DOI will ordinarily have retro effect)
 - Party wishing to limit effects of retrospectivity must provide court with reasons why this will be justifiable
 - Factors taken into account when determining whether to limit retrospective effects of order of invalidity:
 - Disruptive effects of order must be balanced against need to give effective relief to applicant + similarly situated people
 - *Gay + Lesbian Equality*
 - Justifiability + equitability very important
 - Common law offence of sodomy declared unconstitutional + invalid – would not be just + equitable to allow convictions for consensual sexual conduct
 - CC held that courts could condone late noting of appeal against sodomy convictions
 - Order could not benefit persons convicted of male rape (only applied to “consensual sexual act between men”)
- **Suspension of orders of invalidity**
 - *s172(1)(b)(ii)* provides that court may temporarily suspend the effect of a DOI in interests of justice + equity

- Purpose of suspension of DOI
 - ➔ Gives Parliament (or other competent legislature) time to correct defect
- Legislature not obliged to “rectify law”, it may:
 - ➔ Rectify law
 - ➔ Take steps to address detrimental effects which may result from invalidity
 - ➔ Ignore matter altogether
- Whatever legislature does, DOI will come into effect on specified date (Coming into effect of DOI will have no consequences where legislature repeals + replaces unconstitutional provision)
- Effect of suspension of DOI is that legislation remains in force for all purposes (for period of suspension)
 - ➔ Court may grant interim relief pending correction of L
- Extension of period of suspension:
 - ➔ CC held in *Ntuli* that power to extend period of suspension must be used sparingly
- Parties may approach court for variation of term of suspension if they can prove the original period will cause them prejudice
- Most suspension orders do not contain explicit provisions for variation
- DOI is usually immediately effected – Places burden on litigant seeking suspension of DOI (usually state) to persuade court suspension will be in interests of justice + equity
- In *Mistry v Interim National Medical and dental council of SA*
 - ➔ Party wishing court to make order of suspension must provide reliable info justifying doing so, party should at least indicate:
 - Consequences for justice + good government of immediate operational DOI
 - Why other existing measures not adequate
 - What legislation (if any) on subject is pending and reasonable time for adoption of (corrective) legislation
- CC held suspension order appropriate where striking down of statute would leave a gap
- When granting this remedy, court must look further than interests of successful litigant + interests of justice – Possible detrimental effects of immediate invalidation must be compared to continued operation of unconstitutional law
- **No suspension of DOI where:**
 - ➔ **Invalidation of unconstitutional provision will have little or no detrimental effect, Ex**
 - Invalid provision not necessary for furthering of legislation as whole
 - Concerns of invalidation can be addressed by proper application of remaining provisions of statute
 - System set up under legislation not dependent on particular unconstitutional provision for viability
 - ➔ **Unconscionable to retain unconstitutional law even for limited period, will be case where:**

- provisions are “clearly inconsistent” with FR + “manifestly indefensible” under limitation clause so no “warrant for its retention, not even temporary” (*Coetsee v Gov RSA*)

ii. **Declaration of rights**

- May be granted i.t.o:
 - s38 of Cons
 - s19 Supreme Courts Act
- DOR differs from DOI in 2 ways:
 1. DOR may be granted even where no law/conduct found inconsistent with BOR – DOI flows from finding of inconsistency
 2. DOR aimed at resolving disputes between particular parties - DOI binding on all
- *JT Publishing v Minister of Safety and Security*
 - DOR is discretionary remedy – Court not obliged to respond to question that party's application poses
 - Case concerned validity of statute and was covered under s172 of Cons - Because application was moot, attack not considered
- In *President of RSA v Hugo*
 - DOR may sometimes be only form of appropriate relief Ex. where court may determine rights + obligations but person cannot claim relief as consequence of such DOR
 - In this case:
 - Dissenting judgment held that President's act (pardoning certain classes of women prisoners with children) infringed equality clause as did not include male prisoners
 - DOI would have no effect:
 - ➔ Released women would not return to prison
 - ➔ Incarcerated men would remain imprisoned
 - DOR only “appropriate relief” - although this entailed no direct consequential relief for applicant it may have served as support for individual application for pardon
- *Minister of Health v TAC*
 - DOR not only option where court finds infringement of socio-economic right or similar positive obligation – also has structural interdict
 - However CC prefers declaratory orders as they are flexible and valuable in constitutional democracy – allows court to declare law and leave observance thereof to other branches of state
 - Structural interdict not granted as no reason to believe gov would disrespect court order

iii. **Interdictory relief**

- Used as CR by CC in *City Council of Pretoria v Walker*
 - Respondent's right to equality infringed by council's selective institution of legal proceedings (did not enforce claims against township residents)
- 3 Kinds of interdicts

(1) Interim interdicts

- Grants interim relief preserving *status quo* pending adjudication of dispute
- Common law criteria for granting:
 - a *Prima facie* right
 - Threat of irreparable harm
 - No other satisfactory remedy
 - Balance of convenience
- *President of RSA v UDM*
 - Doubtful whether court has power to suspend Act of Parliament through interim relief

(2) Final interdicts

- Includes prohibitory interdicts + *Mandamus*
- Common law principles (*Above*) apply

(3) Structural interdicts

- Directs violator to rectify breach of FR under court supervision
- Consists of 5 elements:
 - i. Court declares in which respects Gov conduct falls short of constitutional obligations
 - ii. Court orders Gov to comply with obligations
 - iii. Court orders Gov to produce report in specified time, showing steps taken + future steps to be taken
 - iv. Applicant afforded opportunity to respond to report
Matter is enrolled for hearing, if satisfactory, report is made court order (failure to comply = Contempt of court)
- Considered by academics as only really effective remedy in socio-economic matters – underlies values of accountability, responsiveness + openness in system of democracy
- Important to devise terms of interdict in flexible manner so that supervision of proposed scheme doesn't become too intrusive, resulting in blurring of executive + judicial functions

iv. Constitutional damages (aka “damages”)

- Necessary for 2 reasons:
 - a) Compensates victim + punishes violator where no other forms of relief effective/appropriate – usually where victim forced to miss unique chance to exercise FR (Ex. Christian prevented from attending church on Christmas day)
 - b) Possibility of award of damages encourages victims to come forward + litigate, vindicating Cons + deterring infringement
- CC set out **general approach to damages** in *Fose v Minister of Safety and Security*
 - 1) Where violation of FR entails commission of a delict, an award for damages **in addition** to those available under common-law will seldom be available – (Court reluctant to grant constitutional damages + punitive damages)
 - 2) Damages **will not necessarily be awarded** even where delictual damages unavailable – In *Charmichele* the CC developed existing delictual remedies

- Indirect application + development of new damages claims
 - Due to development in common law delict almost any negligent state conduct/omission resulting in personal injury will attract liability
 - Courts adopt cautious approach to claims for pure economic loss, SCA rejected claims for loss of profit resulting from:
 - Alleged negligent awarding of a tender to another
 - Claims resulting from delays caused by unlawful land-use planning decision
 - (Usually necessary to show bad faith in such cases)
 - Claims for out-of-pocket expenses succeed more often
- Damages claims derived directly from Constitution
 - CC essentially has to decide whether to award:
 1. Constitutional damages to individuals litigants
 2. Structural relief aimed at addressing systematic problems caused by infringements
 - ➔ Constitutional relief is forward looking + community orientated – CC prefers 2nd approach
 - In *Modderklip*:
 - SCA found FRs of both landowner (to property) + squatters (to housing) impaired. Held:
 - ➔ Squatters could remain on land until state found alternate accommodation
 - ➔ Landowner entitled to constitutional damages for loss of use of land
 - *Permanent Secretary*
 - Eastern Cape + KZN Governments attempted to remove “ghost” beneficiaries from system through suspension of social grants, requiring recipients to re-register before getting benefits
 - Termination of grants successfully challenged in HC
 - Led to flood of litigation – Governments fell behind
 - Usual remedy (compelling government to act by way of interdict, ordering appropriate administrator to make decision) ineffective
 - HC started to substitute own decisions for those of gov – were prepared to approve social grants themselves as “constitutional relief”
 - Above approach criticised by SCA in *Jayiya*
 - Orders ignored provisions of *Promotion of Administrative Justice Act (PAJA)*
- **Other Forms of relief are:**
 - i. **Contempt of Court**
 - Non-compliance with mandatory court orders may be enforced by seeking order declaring respondents (including government officials) to be in contempt of court and committing them to prison
 - Rule *nisi* (order allowing target of order to show cause why he/she should not be held in contempt) usually 1st issued before granting committal order
 - In *Jayiya* SCA held that failure by judgment debtor to pay money order doesn't amount to contempt as:
 - Courts cannot retrospectively develop new criminal offences

- Unfair to hold gov officials in contempt for failure to pay state's debts, while not being in contempt for failure to pay personal debts
 - ii. **Exclusion of evidence**
 - Will constitute appropriate relief (in both civil + criminal cases) if evidence obtained through violation of FR
 - iii. **Administrative + Labour law remedies**
 - Remedies provided i.t.o PAJA (setting aside decisions, substitution of decisions, compensation in exceptional circumstances) apply in constitutional cases as other forms of relief – Also applies to labour law remedies (Ex. Reinstatement)
- **Remedies for private violations of rights**
- s8(3) contains guidelines for courts when applying BOR directly to private conduct although **no particular type of relief is prescribed for private violations of FRs**
 - Guidelines, direct court to:
 - Consider existing legislation + Common law (ordinary law)
 - Find remedies for private violation of FRs
 - Develop remedies that sufficiently address violations if none in ordinary law or existing common law
 - In awarding CRs court must remain aware that it constitutionalises that part of statute, existing common law or its development
 - Ex
 - Private person prevents voter from voting
 - To remedy violation voter must 1st exhaust ordinary legal remedies
 - Court may hold that statutory prohibition of interfering with person's choice to vote constitutes “ordinary legal remedy” which must first be exhausted (*Electoral Act* creates criminal offences to prevent horizontal infringements of political rights)
 - Thus ordinary law “remedy” would be for voter to lay charge
 - Where all possibilities exhausted, successfully or not, voter may invoke s19 right to vote directly, court must then:
 - Consider whether remedies awarded to applicant already, sufficiently address violation (Ex may consider *Electoral Act* “appropriate” to give effect to s19)
 - If not “appropriateness” of existing common law remedies or those developed by indirect application of BOR considered
 - Where no ordinary legal remedy awarded court must revisit statute/ common law and if necessary develop new remedy