Academic Advisory Panel Briefing Paper

Access to Remedy – Systemic Issues and Structural Orders

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Dr Katie Boyle[*]

This briefing paper provides an introduction to the concept of structural orders as a form of remedy to address systemic issues. It is intended to inform discussions for the National Task Force Access to Remedy Roundtable on 7 December 2020 and to be read alongside the Access to Justice Briefing Paper dated 1 September 2020 that explains how access to justice can be framed as a journey from initial advice through to effective remedy using principles of adjudication.

Structural orders may help ensure effective remedies are available for violations of human rights. They are one tool of many and so should be viewed within the context of a range or remedies across a spectrum (deferential to interventionist) that should be available to the judiciary. The more flexible the remedial framework is the better placed the judiciary will be to respond appropriately to ensure the remedy deployed is effective according to international human rights law. Structural orders are one of many different ways of ensuring access to justice depending on the circumstances of each case.

Structural Orders

Structural orders are a remedial response to a systemic problem. In Scotland, the legal terminology for a structural order is a 'structural interdict'.[2] It means issuing a remedy that seeks to address a systemic issue by instructing different arms of the state to cease the violation and ensure access to effective remedies for those impacted. It is a new proposal that seeks to bring Scotland in line with international and comparative best practice. The remedies available to the Scottish judiciary already enable wide-reaching responses to violations of human rights.[3] In this sense, the existing remedies could be combined as an aggregate of remedies in some cases in order to deploy a structural interdict. In other words, the existing system is well placed for development in this area.

The structural interdict can operate as a response to a systemic problem identified in either an individual case that identifies a wider systemic problem or in response to multi-party group proceedings where several litigants are facing the same systemic issue. Comparative best practice suggests that facilitating group proceedings is a helpful way of addressing economic, social, cultural and environmental rights (ESCER) violations because such

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[*] Associate Professor of International Human Rights Law, School of Law, University of Stirling Katie.Boyle@stir.ac.uk

This paper is based on excerpts from a recent book that examines incorporation, justiciability and principles of adjudication for economic and social rights law, Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (New York: Routledge 2020). The research is also drawn from the the Scottish Human Rights Commission paper on *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf; and research under the Nuffield Foundation 'Access to Justice for Violations of Social Rights: Addressing the Accountability Gap' project https://www.nuffieldfoundation.org/project/access-to-justice-for-social-rights-addressing-the-accountability-gap

[2] With thanks to Fiona Killen for clarifying the correct terminology in Scotland.

[3] Remedies available to the judiciary include reduction, declarator, suspension and interdict, specific performance or specific implement, liberation, interim orders, damages.

violations are often collective in nature.[4] The idea is that where many people are facing the same issue in relation to housing, health, social security etc. they should be able to group together in a group proceeding in order to seek a remedy that addresses the systemic violation. These type of cases usually involve multiple applicants (petitioners) and enable the court to review whether the state can remedy a systemic problem engaging multiple stakeholders and multiple defendants in the same case.

Structural cases tend to:

> (1) affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
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> (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and
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> (3) involve structural interdicts, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.[5]

Structural interdicts could be compared with the type of adjudication that saw a broad based approach to human rights violations such as addressing slopping out in prisons in Scotland (where prisoners did not have access to toilets and required to defecate into buckets).[6] In this case the court issued damages to the petitioner finding that slopping out amounted to inhuman and degrading treatment (a violation of Article 3 ECHR). The *Napier* case, for example, dealt with the petition of one prisoner claiming a breach of human rights as a result of slopping out. Several other cases were sisted (suspended) pending the outcome of *Napier*.[7] Following the *Napier* judgment, and in anticipation of the far reaching implications, the court accepted a motion to determine the standard of proof for future cases.[8] This is a form of moderate review/ moderate remedy materialising into long term symbolic and material change.[9]

In Scotland multi-party actions have been addressed on ad hoc basis by identifying a lead case that can act as a test case and sisting (suspending) other cases while awaiting for the outcome of the lead case.[10] Following suggested reform recommended in reports of both the Scottish Law Commission (1996)[11] and the Scottish Civil Courts Review (2009)[12] the Court of Session rules were amended to facilitate the adoption of new procedures for multi-party cases to be initiated at the direction of the Lord President allowing more flexibility for case

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[4] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 189
[5] César Rodríguez-Garavito, Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America, (2011) 89 Texas Law Review 1669-1698, at 1671
[6] *Napier v. The Scottish Ministers* [2005] ScotCS CSIH_16 (10 February 2005) in which the court accepted a motion to determine how future cases might be dealt with as a matter of public interest (setting out the standard of proof on a balance of probabilities) following the potentially wide-reaching decision of Lord Bonomy that slopping out in prison amounted to degrading treatment contrary to Art 3 ECHR in the single case of Robert Napier: Opinion of Lord Bonomy, *Napier (Ap) v. The Scottish Ministers* ScotCS CSOH P739/01 (26 April 2004)
[7] *Alexander Maley v Scottish Ministers* A3898/03 Glasgow Sheriff Court (31 March 2004). See also the discussion led by the law firm leading the slopping out cases: Taylor & Kelly, Slopping Out in Scottish Prisons http://www.taylorkelly.co.uk/prison-law/slopping-out/
[8] *Napier* (2005) para.5-7
[9] César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015) at 10
[10] See Rule of Court 22.3(6) available at https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap22.pdf?sfvrsn=8
[11] Scottish Law Commission, *Report No. 154, Multi-Party Actions* (1996), para.64
[12] Scottish Civil Court Review (2009), Volume 2, chapter 13, pp.152-155, available at https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4

management by the nominated judge (Rule 2.2).[13] Multi-party procedures have been facilitated under Rule 2.2 on a number of occasions to deal with systemic issues, including claims under the Damages (Asbestos-related Conditions) (Scotland) Act 2009[14] and in response personal injury actions relating to the use of vaginal tape and mesh.[15] Further reform under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 provides for group litigation in the Court of Session. The new group proceeding framework operates on an opt-in basis and with a focus on damages as a response to systemic issues. The Scottish Civil Justice Council have also now produced a new rule under the Civil Litigation (Expenses and Group Proceedings) Act 2018.[16]

There is a tendency under the current human rights framework to respond to violations of human rights by issuing damages.[17] Whilst compensation is an important response to ensure access to an effective remedy it is not the only means, nor is it always a necessary component of an effective remedy in international human rights law. For example in the recent case of Rosario Gómez-Limón Pardo the UN Committee on Economic, Social and Cultural Rights held that there was no need to issue financial compensation in response to the violation of the right to adequate housing.[18] Instead, the Committee held that Ms Gómez-Limón Pardo be provided with suitable housing following an unlawful eviction order and that her legal expenses be covered.[19] In addition, the Committee instructed Spain (the state party) to undertake domestic reform to ensure others were able to access an effective domestic remedy for unlawful evictions in order to ensure cessation of the violation. Spain was required to report what steps were taken within six months of the judgment meaning the Committee took on supervisory role post-judgment.[20]

There is more scope for exploring the possibilities that multi-party actions or group cases can provide in terms of dealing with systemic ESCER rights violations in Scotland. Comparative experience indicates that courts must adapt procedures to deal with systemic ESCER violations by facilitating access to a collective procedure with multiple stakeholders, multiple defendants and through the deployment of structural remedies.[21] Responding to this need in the deployment of effective remedies is something that the First Minister's Advisory Group has recommended.[22]

Lessons can be learned from other jurisdictions to help inform discussions as part of the remit of the National Task Force to implement the recommendations of the First Minister's Advisory Group.

Regional and international examples

[13] See Rule of Court 2.2 available at https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10
[14] Court of Session No.2 of 2012, https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions
[15] Court of Sessions Directions No.2 of 2015 and No.2 of 2016, https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions
[16] The rule is available here: https://www.scottishciviljusticecouncil.gov.uk/news/2020/07/09/group-proceedings-actions-now-available-in-scotland-s-highest-civil-court -
[17] This is not surprising given the current ECHR incorporation model. Also evident in Part 1 Success Fee Arrangements Civil Litigation (Expenses and Group Proceedings) Act 2018
[18] *Rosario Gómez-Limón Pardo v. Spain* (Communication No. 52/2018) [05.03.2020] para.13
[19] Ibid para.13
[20] Ibid para.14
[21] Garavito and Franco n 9 and Landau n 4
[22] Recommendations for a new human rights framework to improve people's lives, Report to the First Minister, First Minister Advisory Group on Human Rights Leadership, December 2018, available at http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdfat 29 & 35

Structural orders are used across the globe under both national, regional and international legal systems. The European Court of Human Rights for example now uses a pilot system to deal with systemic cases.[23] The central idea behind this procedure is to ensure applicants obtain redress more speedily if an effective remedy is established in national law to address a systemic issue.[24] This allows the court to deal with its heavy case-load and limited resources by ensuring repetitive cases and those cases that are urgent or raise questions of wider pubic importance can be adjudicated holistically and more speedily where the structural remedy addresses the systemic issue.[25]

The European Court of Human Rights has issued structural orders under the pilot system. For example, in response to the historic coercion of land in Poland the court held that the state should take measures that would afford a remedy to all those who faced a violation of Article 1 Protocol 1 ECHR. The Polish Government then adopted a new law under which financial compensation was made available to all those impacted meaning an effective remedy was available at the national level.[26]

Other regional human rights systems adopt a similar approach. For example, the Inter-American Court of Human Rights issued a structural order to address the vulnerable situation of the Xákmok Kásek Indigenous Community in Paraguy who had been unable to take possession of their ancestral land and who were in the meantime left without access to adequate food, medicine and sanitation.[27] The court ordered the return of the Xákmok Kásek Community's land, instructed a public act of acknowledgement of the wrongdoing by the state and instructed the state to amend the domestic law to create an effective system for indigenous peoples to reclaim ancestral lands at the domestic level. Further, the court undertook to supervise compliance with judgment.[28]

This approach is also evident as part of international complaints mechanisms. Similar approaches to preventing future violations from occurring have been the subject of cases before the UN Human Rights Committee (on access to medical care)[29], the UN Committee on the Elimination of Discrimination Against Women (on domestic violence)[30] as well as the UN Committee on Economic, Social and Cultural Rights (on eviction orders).[31]

Comparative examples

The origin of structural orders to address systemic issues developed in India when the court started issuing structural orders to initiate food programmes.[32] Other countries engaged with social rights adjudication followed suit.

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[23] Rule 61 of the Rules of Court. For an explanation see Janneke Gerards, Abstract and Concrete Reasonableness Review by the European Court of Human Rights, (2020) 1(2) European Convention on Human Rights Law Review 218-247, FN 10

[24] European Court of Human Rights, Pilot Judgment Procedure, Information Note Issued by the Registrar, para.6, available at https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf

[25] Ibid

[26] *Broniowski v. Poland [GC],* no. 31443/96, ECHR 2004-V (link). See also *Broniowski v. Poland (friendly settlement) [GC]*, no. 31443/96, ECHR 2005-IX (link) 2 and *E.G. v. Poland*, no. 50425/99 and other Bug River Applications, decision of 23 September 2008

[27] Inter-American Court Of Human Rights, *Case Of The Xákmok Kásek Indigenous Community V. Paraguay, Judgment Of August 24, 2010 (Merits, Reparations, And Costs),* para.2

[28] Ibid

[29] *Toussaint v Canada*, United Nations Human Rights Committee, CCPR/C/123/D/2348/2014, 7 August 2018. See also *Mbongo Akwanga v Cameroon*, Merits, UN Doc CCPR/C/101/D/1813/2008, IHRL 172 (UNHRC 2011), 22nd March 2011: para.14 – state required to prevent such violations from occurring in the future

[30] *X and Y v. Georgia,* Communication No. 24/2009; U.N. Doc. CEDAW/C/61/D/24/2009 para.11(b)(ii)

[31] *Communication submitted by:* Rosario Gómez-Limón Pardo n18

[32] *People's Union for Civil Liberties v. Union of India & Others Writ Petition (Civil) No. 196 of 2001*, (May 8, 2002) (India), available at http://www.righttofoodindia.org/orders/may8.html

Since 1997 the Colombian Constitutional Court has handed down structural remedies in relation to the social security system,[33] massive prison overcrowding,[34] lack of protection for human rights defenders,[35] and failures in the health care system.[36] In 2004 the court combined 1150 *tutela* cases of internally displaced people (IDP) and issued a structural remedy[37] in three parts:

> 'First, it mandated that the government formulate a coherent plan of action to tackle the IDPs' humanitarian emergency and to overcome the unconstitutional state of affairs. Second, it ordered the administration to calculate the budget that was needed to implement such a plan of action and to explore all possible avenues to actually invest the amount calculated on programs for IDPs. Third, it instructed the government to guarantee the protection of at least the survival-level content (mínimo vital) of the most basic rights—food, education, health care, land, and housing. All of these orders were directed to all relevant public agencies, including national governmental entities and local authorities.'[38]

In 2018 the Colombian Constitutional Court issued a structural remedy on the right to a healthy environment and the protection of future generations (Article 79). The court ordered the government to undertake a participative process to develop an 'intergenerational pact for the life of the Colombian Amazon' (PIVAC) to reverse the damage caused by deforestation of the Amazon. The tutela device and the operation of structural remedies such as this are embedded in participative and deliberative processes that seek to include those impacted by the decision. In this case, the court required coordination with the actors of the National Environmental System and the participation of the applicants (25 children and young people), the affected communities and interested population in general, to formulate a short, medium, and long term action plan to counteract the deforestation rate in the Amazon, tackling climate change and engaging directly with protecting the rights to water, air and health.[39]

The benefits of this approach to ESCER are far-reaching:

> '[t]he effects includes—in addition to governmental action specifically mandated by the court—the reframing of socioeconomic issues as human rights problems, the strengthening of state institutional capacities to deal with such problems, the forming of advocacy coalitions to participate in the implementation process, and the promoting of public deliberation and a collective search for solutions on the complex distributional issues underlying structural cases on [economic and social rights].'[40]

One of the necessary components of a structural remedy is the role played by civil society as part of a participative and deliberative process where the court listens to evidence on the particular systemic issue and is open to issuing remedies that address the issue, compel the duty bearer to act, supervise compliance and include those impacted in the post judgment decision making and compliance processes. This approach is embedded in the principles of

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[33] SU-090/00 ;T-535/99; T-068/98; SU-559/97
[34] T-153/98.
[35] T-590/98
[36] T-760/08
[37] T-025/04
[38] Rodríguez-Garavito n5
[39] STC4360-2018; No: 11001-22-03-000-2018-00319-01 (Approved in session on April 4th, 2018) Bogotá, D.C., (5th April 2018) For a discussion on the case see here: https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision/
[40] César Rodríguez-Garavito n5 at 1676

participation and deliberation, as well as the remedial and counter-majoritarian principles as an ESCER accountability mechanism (see Access to Justice briefing).

The court in Argentina has also gone so far as to offer structural remedies where the local authority has failed in implementing ESCER, such as the right to housing. This has included wide ranging structural remedies for collective cases involving multiple families (like a class action). In the *Agüero* case a structural order involved 86 families living in irregular conditions on state-owned land.[41] Initially the case was settled and the administration agreed to design a specific housing plan for the families – the administration's failure to comply led to a new injunction and to a court ordered seizure of public monies to secure funding for the promised plan. The administration adopted a plan to build 91 dwellings giving priority in the legal tender to enterprises offering jobs to residents. The administration was to offer residents access to a special line of credit where payments were not to exceed 20% of monthly income. This structural approach ensured budget, policy and outcome were all embedded in international human rights law.[42]

Similarly in a case involving the right to a healthy environment the court issued a structural remedy that required the state to produce and disseminating public information; control industrial pollution; clean up waste; expand water supply, sewer and drainage works; develop an emergency sanitation plan; and adopt a monitoring system to assess compliance with the plans.[43]

Courts addressing systemic problems in an individual case

The above cases illustrate the structural order as a response to collective lititgation. It is possible for courts to issue a form of structural remedy on the basis of an individual case. This approach ties in with the concept of what constitutes an effective remedy in international law, a definition that includes ensuring the cessation of the violation for the case in hand, and for other cases that may follow. In the case of *Toussain*, a woman with precarious immigration status was denied healthcare constituting a breach of her right to life, the UN Human Rights Committee held that Ms Toussain should receive compensation. In addition, the Committee also held that Canada (the state party) was also under an obligation to take steps to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.[44] Similarly, in the case of *Molina Thiessen v Guatemala*, the Inter-American Court of Human Rights produced a step-by-step guide[45] on how to ensure structural changes seeking to address the wider issue of access to justice and systemic impunity in Guatemala based on the violation in one incident. This guarantee of non-repetition is again linked to the concept of an effective remedy, part of which requires cessation of the violation for the case in hand, and for others that may be impacted.

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[41] Buenos Aires Administrative Trial Court No.5 *Agüero, Aurelio E. v GCBA S/AMPARO*, friendly settlement, Dec 2003

[42] For a discussion on this see Christian Courtis, Argentina, in Malcom Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, (CUP 2008) 163-182 at 165

[43] *Beatriz Silvia Mendoza v. National Government and Others* (2008) (Damages stemming from contamination of the Matanza-Riachuelo River) M. 1569, 8 July 2008 (Argentina, Supreme Court)

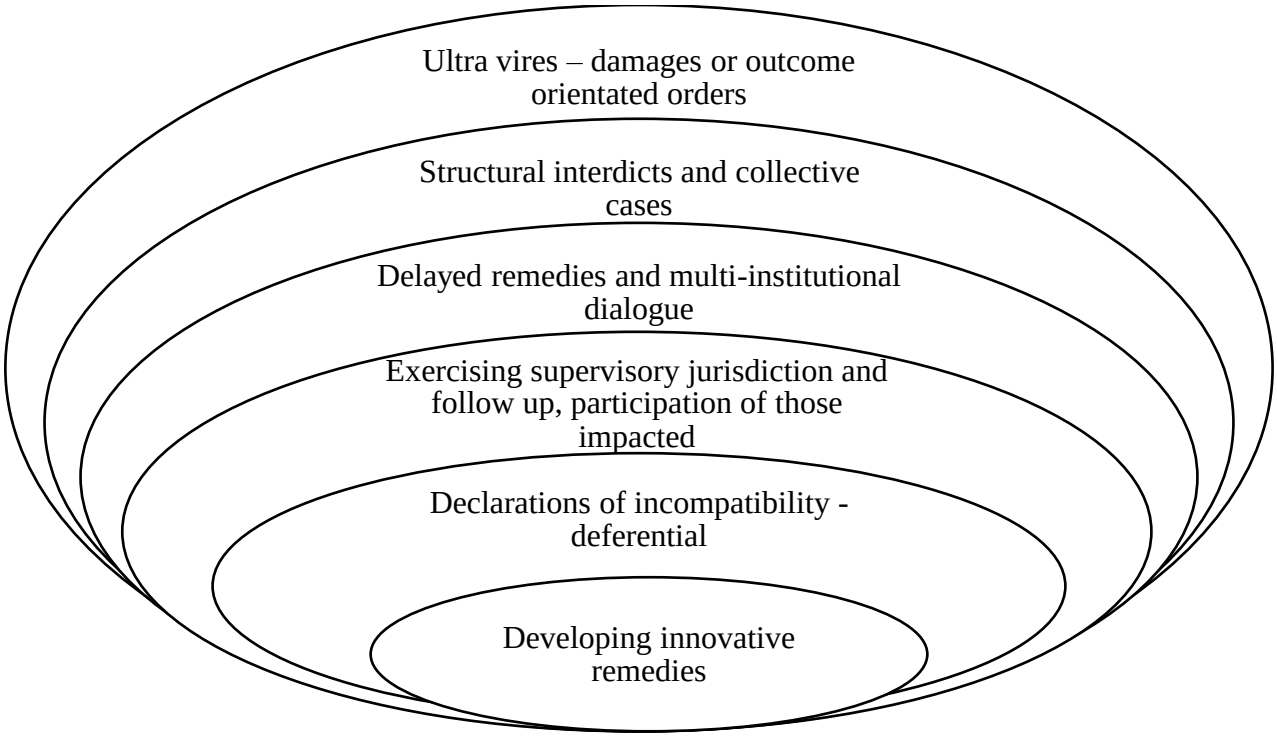
[44] *Toussaint v Canada*, United Nations Human Rights Committee, CCPR/C/123/D/2348/2014, 7 August 2018, para.13

[45] Order of the Inter-American Court of Human Rights, 16 November 2009, *Case of Molina-Theissen v. Guatemala* (Monitoring Compliance with Judgment) available at https://www.corteidh.or.cr/docs/supervisiones/molina_16_11_09_ing.pdf,
para.32. For a discussion on this see Lucrecia Molina Theissen, Until we find Marco Antonio, Practice Note, 2020 (12) Journal of Human Rights Practice 157-162, 24 June 2020

What does this mean for Scotland?

The above cases help to demonstrate that there is a variety of ways through which to respond to systemic problems. Whilst the sist and suspend approach has to a large degree been an innovative way to deal with many cases facing the same systemic issue there is scope to improve on this. The new human rights framework offers an opportunity to adapt and improve the remedial responses to human rights violations. Structural interdicts are one means through which this can be achieved and should be viewed as one of approach of many to ensure human rights violations are addressed with effective remedies. Ideally a spectrum of remedies should be available to the judiciary. Sometimes cases will merit a deferential response where the judiciary remits an unlawful decision to the decision maker to address. Other responses will require more interventionist remedies to address a violation immediately. The structural interdict allows for an aggregate of remedies that can range from deferential to interventionist. For example, if there was a systemic issue relating to adequate housing the court could respond by issuing a declaratory order as to the unlawfulness, issue interim relief to those affected, issue a specific implement order to instruct different actors to fulfil specific obligations in relation to the case over a period of time (which might include supervision), and issue an order requiring the state to adopt a housing strategy designed to fulfil the right to adequate housing. Importantly, damages alone are not a sufficient response to deal with systemic human rights violations, and in some cases may not be necessary if the systemic issue is addressed thus ensuring cessation of the violation (with legal costs covered). In the Napier case for example, this could have included an order instructing the Scottish Ministers and Scottish Prison Service to cease slopping out, rather than to encourage this response by solely issuing damages to all those impacted.

Figure 1.1 Developing innovative remedies[46]



[46] Table excerpt from Boyle, Economic and Social Rights Law (2020), p.40