Docket: T1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA
(Representing the Minister of Indigenous Services Canada)

Respondent

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

Interested Parties

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LIST OF AUTHORITIES

	Description
1.	Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge: Cambridge University Press, 2021), ch 7.

TAB 1

REMEDIES FOR HUMAN RIGHTS VIOLATIONS

A Two-Track Approach to Supra-national and National Law

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7

Declarations, Injunctions and the Declaration Plus

7.1 Introduction

Writing in 1976, Abram Chayes outlined a new form of public law litigation. It had started in the United States in school desegregation cases and had spread to cases dealing with conditions of confinement in custodial institutions.

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The focus was on the future as opposed to the past. Specifically, the remedy was not dictated by past violations of rights. Rather it was a decree or injunction that had been "fashioned ad hoc". Such forward-looking decrees resembled legislation and administration more than traditional backward-looking adjudication.[1]

Chayes acknowledged that some questioned the legitimacy of the new form of public law litigation. Nevertheless, he suggested that the new approach might be justified because the judges were engaging in "a continuous and rather tentative dialogue"[2] with governments as well as an expanding range of participants in the lawsuit. The trial judge did not impose the details of the decrees from on high. Rather, the details were often negotiated between the parties. Procedural and remedial innovation was ultimately justified by the substantive justice of the claims made by minorities and prisoners and by the bureaucratic nature of modern government. American public law litigation – controversial from the start – has survived more than four decades of assault by legislatures[3] and by those who argue that it has allowed judges to exceed their legitimate role under the separation of powers.[4] It survives, however, by the thinnest of margins.

In 2011, the United States Supreme Court upheld in a 5–4 decision an order that California reduce prison overcrowding as a response to documented incidents of cruel and unusual punishment caused by deficient medical care for its inmates.[5] Today, academic defenders of public law litigation in the United States concede that it is best seen as "experimental" litigation that may only be justified given pervasive dysfunction in governance.[6] Some have predicted, however, that it may return given attempts by the Trump administration to dismantle the administrative state.[7]

[1] Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv. L. Rev.* 7, 1294, 1297.

[2] Ibid., 1316.

[3] Prison Litigation Reform Act, 1996, Pub. L. No. 104–134, 110 Stat. 1321, 1367–68 (1996) (codified at 18 U.S.C. § 3626 (a) and (b) (2012)).

[4] Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (New Haven: Yale University Press, 2004); Donald Horowitz, *The Courts and Social Policy* (Washington: Brookings, 1977); John Yoo, "Who Measures the Chancellor's Foot: The Inherent Remedial Authority of the Federal Courts" (1996) 84 *Calif. L. Rev.* 1121.

[5] *Brown* v. *Plata*, 131 S.Ct. 1910 (2011).

[6] Charles Sabel and William Simon, "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv. L. Rev.* 1016.

[7] Kathleen Noonan, Jonathan Lipson and William Simon, "Reforming Institutions: The Judicial Function in Bankruptcy and Public Law Litigation" (2019) 94 *Indiana L. J.* 491.

But public law litigation has done better as an American export. It was first embraced in India.[8] Public law litigation in India, as in the United States, has until recently focused almost exclusively on systemic remedies. At times, it has had unintended and even counter-productive effects such as authorizing evictions in the hope of better housing.[9] As in the California prison case, individual litigants who have been mistreated have not received individual remedies as courts focus on systemic reform such as reducing prison overcrowding. Public law litigation has also come to Canada, but often with judges deferring more to the state by using declarations than by retaining jurisdiction and issuing injunctions.[10]

Some other jurisdictions have engaged in public law litigation that follows a two-track approach in combining individual and systemic relief. The South African and Colombian Constitutional Courts have both combined individual and systemic relief. Litigants have been protected from eviction while governments were given time to engage with those who would benefit from systemic housing reforms. Individuals have received court ordered medical treatment while the court has engaged in a more deferential and inclusive process to achieve universal healthcare.

The two-track approach has also been used by supra-national courts. Both the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) have ordered individual remedies, such as compensation and necessary medical treatment, while also engaging with states around broader systemic reforms in an attempt to prevent similar rights violations in the future.[11] The IACtHR monitors compliance, whereas a Committee of Ministers administers complex relief under Article 46 of the European Convention on Human Rights. Although it remains dominant in the literature, there are many alternatives to the American model of public law litigation.

[8] P. N. Bhagwati, "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum. J. Transnational L.* 561.

[9] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge: Cambridge University Press, 2017).

[10] Kent Roach, "Charter Remedies" in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017), pp.689–692; Kent Roach, *Constitutional Remedies in Canada,* 2nd ed. (Toronto: Thomson Reuters, 2013), Chapters 12–13.

[11] Alexandra Huneeus, "Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts" (2015) 40 *Yale Int'l. L. J.* 1.

Public law litigation, however, remains a hard sell especially for domestic judges who are often reluctant to retain jurisdiction over a case.[12] Trial judges often face a stark choice between using declarations that will end their involvement in the case but may be the subject of continued dispute and ordering clear and precise injunctions which can be coercively enforced through the contempt power.

In this chapter, I will advocate for the use of a new intermediate remedy: the declaration plus.[13] This remedy combines the flexibility and deference to governments implicit in the declaration with the retention of jurisdiction that accompanies interim and final injunctions. It fills a gap when declarations alone would be ineffective in preventing rights violations but where a detailed injunction might demand too much of a court in confronting difficult polycentric problems. Retention of jurisdiction allows domestic courts, like supra-national adjudicators, to engage in naming and shaming should governments act unreasonably. It also allows courts, if necessary, to elaborate on what is required to comply with rights and to make their relief more specific and precise.

7.1.1 Outline of This Chapter

Section 7.2 of this chapter will discuss the practice of public law litigation starting in the United States but migrating to supra-national and other national courts. Contrary to popular caricatures of judges running schools and prisons, the reality is more nuanced. There are striking similarities between this practice of public law litigation and the understanding of international law as an iterative process than relies more on dialogue and persuasion than command. This part will also examine cases where public law litigation has gone off the rails because of an exclusive focus on systemic remedies that ignores individual litigants and the violations they have suffered. It will also be seen that the ECtHR and IACtHR, when they have confronted complex institutional cases, have used both individual and systemic remedies and appropriately recognized that the latter will be less dominated by the courts. This affirms how common concerns for the separation of powers and subsidiarity influence systemic remedies.

[12] See, for example, Beverley McLachlin, "The Charter: A New Role for the Judiciary" (1991) 29 *Atla. L. Rev.* 540, 552–553.

[13] See also Roach, *Constitutional Remedies in Canada*, p.12.700ff.

Section 7.3 will suggest that while courts should be cautious when dealing with polycentric or multi-faceted problems, they should not abstain from engaging with them. I will suggest that both domestic and supra-national courts should respect the important roles of legislatures and the executive in systemic reform. They should also recognize that negotiation, mediation and broad public participation can help resolve some of the complexities of polycentric issues.

Section 7.4 will present a new remedy: the declaration plus. It allows courts to articulate in a general sense what compliance with human rights requires while retaining jurisdiction to resolve disputes that may arise from the meaning of a declaration and from new evidence and changed circumstances. It avoids the need for courts to make very specific orders that give fair notice to defendants about what they must and must not do to avoid punishment for contempt. It will be suggested that the declaration plus is consistent with both the practice of supra-national courts and a few Canadian cases.

Section 7.5 will examine how complex institutional relief can be fitted into the two-track model advocated throughout the book. Public law litigation and structural injunctions are generally built on the back of multiple and repetitive human rights violations.[14] In the two-track approach, judges would be more willing to order individual relief while at the same time trying to fashion systemic relief to prevent future violations. Individual relief should redress past and continuing violations suffered by litigants and also include specific orders to prevent irreparable harm. Courts that order individual remedies can achieve some remedial success. They can also demonstrate the harms that dysfunctional state institutions cause to real people. At the same time, courts should engage with governments and the affected public in the development of longer-term systemic remedies. Judges who undertake the difficult task of systemic institutional reform should beware of the likelihood of remedial failure and when necessary take different approaches to prevent repetitive violations.

7.2 Practice

The traditional view of adjudication conceives of the court issuing one shot and simple remedies such as damages designed to restore identified

[14] Owen Fiss acknowledges that while the structural injunction is future orientated that there are reparative aspects to it: Owen Fiss, *The Civil Rights Injunction* (Bloomington: Indiana University Press, 1979).

plaintiffs to the position that they would have occupied but for the legal wrong done to them. Courts of equity, however, have always dealt with more complex issues that require them to retain jurisdiction. One example is bankruptcy proceedings where courts often put failing corporations into receivership, deal with multiple parties and manage complex polycentric issues.[15] The novelty of complex and systemic relief in public law litigation can easily be overstated. In the human rights context, there is a tendency to forget that courts only attempt structural reform of institutions in the context of repetitive and continued violations.

7.2.1 American Public Law Litigation

7.2.1.1 *Brown* v. *Board of Education II* and the Start of Public Law Litigation

The United States Supreme Court could not see itself to the conclusion that segregated schools were unconstitutional until it had decided to take a gradualist remedial approach.[16] This is an important reminder that those asking a court to recognize new and controversial rights ignore remedies at their peril. Ask for too much, and the court may simply reject the right. Ask for too little, and the remedy may be ineffective.

In *Brown* v. *Board of Education II*,[17] the plaintiffs, led by Thurgood Marshall, argued that the large numbers affected by *Brown* should not take away from the "personal and present rights" of the plaintiffs. Marshall stressed that "behind every numeral is a Negro child, suffering the effects" of segregation.[18] His argument appealed to a widely held

[15] Theodore Eisenberg and Stephen Yeazell, "The Ordinary and Extraordinary in Institutional Litigation" (1980) 93 *Harv. L. Rev.* 465; William Conklin and Jodi Morrison, "Public Law Issues in a Private Law World: The Appointment of a Receiver as a Case Study" (1986) 26 *Osgoode Hall L. J.* 45; Noonan, Lipson and Simon, "Reforming Institutions".

[16] Michael Klarman has concluded that "an informal deal had enabled the Court to be unanimous in *Brown I*. The more ambivalent judges supported the result in exchange for a gradualist remedy". Chief Justice Warren indicated that "the time element is important in the deep South". Justice Jackson stressed the limits of judicial remedies as did Justice Frankfurter, who observed that "a declaration of unconstitutionality is not a wand by which these transformations can be accomplished". Michael Klarman, *From Jim Crow to Civil Rights* (New York: Oxford University Press, 2004), pp.313, 302, 307, 311, 316.

[17] 349 US 294 (1955) [henceforward *Brown II*].

[18] Richard Kluger, *Simple Justice: The History of Brown* v. *Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 1975), p.728; Klarman, *From Jim Crow to Civil Rights*, p.316.

sense that courts are uniquely equipped to provide individual remedies. Nevertheless, the United States Supreme Court in *Brown II* rejected the individual remedy of ordering that the named litigants in the case be admitted into all-white schools, as it had done in prior cases ordering that African American litigants be admitted to universities.[19] Instead, the message that *Brown II* sent to governments and society was the ambiguous one of "all deliberate speed"[20] to achieve desegregation.

The Court stressed that local school boards had to make a prompt, reasonable and good faith start to full compliance with school desegregation. In response to the defiance it heard from lawyers representing the Southern states, the Court reminded them that disagreement with the constitutional principles in *Brown* was not a legitimate reason for delay. At the same time, the Court contemplated that the executive would "have the primary responsibility" for responding to local problems and proposing desegregation plans. The "courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles".[21] The school boards would have to justify delay to trial judges. These judges would use their equitable powers to retain jurisdiction over the cases and to determine the adequacy of compliance plans.

Brown II failed. It was perceived at the time as backtracking from *Brown I*. Roger Carter, one of the plaintiff's lawyers, concluded that the Court's gradualist remedy in *Brown II* was "a grave mistake".[22] In the 1963–1964 school year, only 1.2 per cent of Black children in the South attended public schools with whites. The percentages were to increase with federal legislative action to 16.9 per cent in 1966–1967 and to 91.3 per cent in 1972–1973.[23]

[19] *Missouri ex rel. Gaines* v. *Canada et al.*, 305 US 337 (1938); *Sipuel* v. *Oklahoma,* 332 US 631 (1948); *Sweatt* v. *Painter*, 339 US 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 US 637 (1950). Only Justices Black and Douglas showed support for a limited immediate remedy that would only apply to the named plaintiffs and not the entire class they represented: Klarman, *From Jim Crow to Civil Rights,* p.316.

[20] *Brown II* at 301.

[21] *Brown II* at 294.

[22] Robert L. Carter, "The Warren Court and Desegregation" (1968) 67(2) *Mich. L. Rev.* 236, 243.

[23] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, 2nd ed. (Chicago: University of Chicago Press, 2008), p.50.

Although *Brown II* is derided today as "infamous",[24] it still establishes the basic procedural stance for public law litigation where courts retain jurisdiction and look primarily to the government to comply in good faith and to develop specific remedial plans.[25] As Wendy Parker has suggested, this asks those responsible for the violation to develop plans to remedy it.[26] The plan proposals are, however, subject to adversarial challenge.

Brown II appealed to the "practical flexibility" of equitable powers to adjust and reconcile the competing "public and private needs".[27] This contemplates a balancing of interests. However, the notion of "private needs" was not transparent. It was in tension with the Court's warning that objections to the underlying right was not a legitimate factor. As suggested in Chapter 1, Section 1.9, a more transparent approach to balancing would today employ proportionality reasoning.

The remedy contemplated in *Brown II* was systemic. In part, this reflected that the case involved combined litigation from different states, but it also reflected the Court's desire to take an incremental approach. In 1958, however, the Court insisted on an individual remedy in the famous *Cooper* v. *Aaron* case involving Central High School in Little Rock, Arkansas. All of the Justices signed an opinion that required the immediate desegregation of Central High by admitting nine Black students.[28] The high school was eventually desegregated, but by 1963 only 69 of its 7,700 students were Black.[29]

The Court's approach to the power of courts to order desegregation remedies waxed and waned in subsequent years. The breadth of equitable remedial powers allowed the courts subsequently to order remedies that went beyond the right to desegregated schools and included other remedial measures such as more funds for education.[30] These remedies were, however, not used until white flight to the suburbs made public school integration in the North often impossible. At the same time,

[24] Jim Chen, "With All Deliberate Speed: *Brown II* and Desegregation's Children" (2006) 24 *Law & Ineq.* 1, 3.
[25] Mark Tushnet, *Weak Courts, Strong Rights* (Princeton: Princeton University Press, 2004), pp.247–250.
[26] Wendy Parker, "The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities" (1999) 50 *Hastings L. J.* 475, 554–555.
[27] *Brown II* at 300.
[28] *Cooper* v. *Aaron,* 358 US 1 (1958) [henceforward *Cooper*].
[29] Rosenberg, *The Hollow Hope*, p.84.
[30] *Milliken* v. *Bradley II*, 433 US 267 (1977); *Missouri* v. *Jenkins,* 110 S.Ct. 1651 (1990).

equity was a double-edged sword. In the 1990s, the Court would appeal to equity to restrain remedial powers by stressing that courts should do no more than was necessary[31] and could relinquish jurisdiction because they had done all that was possible even if integration was not achieved.[32] Today, the Court seems to oppose the very idea of remedies designed to achieve racial balance.[33]

When the Court wanted to restrict remedies, especially metropolitan busing plans, it appealed to the traditional corrective ideal that the remedy could only respond to the proven effects of the violation.[34] Busing was a controversial systemic remedy. Judge Garrity in the Boston busing case acknowledged that "the plaintiffs in this case do not seek a remedy that would compensate them, as a class, for the injury already wrought by the defendants' long-practised racial discrimination. That injury, of course is immense ... The desegregation plan that the court orders cannot make the plaintiffs whole".[35]

Busing not only failed to make Black school children "whole". In some cases, it harmed them. Derrick Bell who acted for the plaintiffs in some of these cases increasingly became worried that the institutional litigator behind the case had placed its organizational interests in achieving integration over the educational and other needs of Black children.[36] Professor Bell would later imagine that the courts should have focused on improving educational quality for students left in predominately Black schools, such as improving teacher–pupil ratios and increasing the

[31] *Spallone* v. *United States*, 493 US 265 (1990).

[32] *Board of Education* v. *Dowell*, 498 US 237 (1991) at 248; *Freeman* v. *Pitts*, 503 US 467 (1992) at 492; *Missouri* v. *Jenkins*, 515 US 70 (1995) at 91.

[33] *Parents Involved in Community Schools* v. *Seattle School District*, 127 S.Ct. 2738 (2007) at 2769 where Chief Justice Roberts simplistically declared that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race" through race conscious remedies. This conclusory reasoning has rightly been criticized as "an Orwellian absurdity": Charles J. Jr. Ogletree and Susan Eaton, "From Little Rock to Seattle and Louisville: Is All Deliberate Speed Stuck in Reverse" (2008) 30(2) *U. Ark. Little Rock L. Rev.* 279, 287.

[34] *Milliken* v. *Bradley*, 418 US 717 (1974); *Missouri* v. *Jenkins,* 110 S.Ct. 1651 (1990); see generally Kent Roach, "The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies" (1991) 33 *Ariz. L. Rev.* 859.

[35] *Morgan* v. *Kerrigan*, 401 F. Supp. 216 (D. Mass., 1975) at 231. He placed the public-school system into receivership only returning it to local control in 1985; Peter Hoffer, *The Law's Conscience Equitable Constitutionalism in America* (Chapel Hill: University of North Carolina Press, 1999), p.193.

[36] Derick A. Bell Jr., "Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation" (1976) 85 *Yale L. J.* 470.

number of Black educators and paying them better while pursuing the longer systemic remedy of integration.[37] In other words, Bell's approach would have combined remedies that attempted to compensate for the harms of segregation while at the same time not abandoning the systemic remedy of an integrated non-discriminatory public-school system.

The desegregation cases have many remedial lessons. They laid the pattern for many subsequent cases involving complex institutional remedies. Courts could appeal to their equitable powers and discretion to justify a wide range of remedies. At the same time, they could also not escape the corrective ideal that remedies should be restricted to responding to harms caused by the specific violation. *Brown II* demonstrates the need for more transparency about approaches that balance interests. It must be clear that objections to rights are not a legitimate reason to limit remedies. The balancing of interests at the remedial stage should not allow a re-litigation of the original rights violation.

The desegregation cases also revealed the difficulty and perhaps even the impossibility of achieving systemic success in the face of executive, legislative and public opposition.[38] These cases also confirm the wisdom of Thurgood Marshall's warning to the Court in *Brown II* that it should not forget that they were dealing with real children who only had one chance for an education.[39] In other words, it affirms the importance of not forgetting about those individual litigants – such as the nine applicants in *Cooper* – who had established a rights violation and should receive some remedy.

7.2.1.2 Police Cases American courts dealt with police misconduct in the 1960s by extending the exclusionary remedy to the states. As discussed in Chapter 6, Section 6.4, the exclusionary remedy is a blunt and limited remedy in dealing with police misconduct. In a case in the 1970s, a trial judge found the Philadelphia police liable for a pattern of misconduct. The judge gave the city thirty days to submit a plan for revised complaints procedures. The Supreme Court reversed this attempt to reform policing. It held that the plaintiffs lacked standing and that

[37] Derrick Bell, *Silent Covenants: Brown* v. *Board of Education and the Unfulfilled Hopes for Racial Reform* (New York: Oxford University Press, 2005), pp.38–50.

[38] The courts were more effective when their decisions on segregation were linked with increased funding that the federal government made available for integrated schools: Rosenberg, *The Hollow Hope*, pp.97–99. Rosenberg also suggests that the courts provide "cover" for the executive to make reforms: ibid., p.102.

[39] Kluger, *Simple Justice*, p.728; Klarman, *From Jim Crow to Civil Rights,* p.316.

federalism prevented the Federal Court from using the extraordinary remedy of an injunction to prevent future violations.[40] In 1984, the Court held that a Black man who has been choked unconscious by the Los Angeles police after a traffic stop for a broken tail light did not have standing to seek injunctive relief.[41] This was because he had not established the likelihood that he would be subject to a similar choke hold in the future. This decision was made despite evidence of at least fifteen deaths caused by police chokeholds in Los Angeles.[42] In his dissent, Justice Marshall accurately noted that "the city is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result".[43]

After the acquittal of four Los Angeles police officers in the beating of Rodney King, Congress enacted legislation allowing the United States Attorney General to seek declaratory and equitable relief if it established a pattern and practice of rights violations by local law enforcement.[44] After investigations, the federal Justice Department would often obtain consent decrees dealing with matters such as discrimination and the use of force. These decrees are approved and enforced by the court. Independent monitors are often appointed to measure compliance, sometimes for many years. Private individuals, however, cannot seek such remedies. This and related consent decrees that are available in cases involving the disabled fit into the American pattern of legislation as opposed to the courts playing a key role in either encouraging or discouraging judicial remedies. This illustrates that the strength of judicial review in the United States at least with respect to remedies often depends on legislative action.

7.2.1.3 Prison Cases The Court's gradualist approach in *Brown II* laid the foundation for litigation designed to bring American prisons into compliance with human rights.[45] Critics argued that these cases were

[40] *Rizzo* v.*Goode*, 423 US 362 (1976).
[41] *Los Angeles* v. *Lyons*, 461 US 95 (1983).
[42] Ibid.
[43] Ibid. at 113.
[44] See now 34 U.S.C. § 12601; see generally Civil Rights Division, US Department of Justice, "Pattern and Practice Police Reform Work: 1994 to Present" (2017), online (pdf): www.justice.gov/crt/file/922421/download; Myriam Gilles, "Reinventing Structural Reform: Deputizing Private Citizens in the Enforcement of Civil Rights" (2000) 100 *Colum. L. Rev.* 1384; Stephen Rushin, "Structural Reform Litigation in American Police Departments" (2015) 99 *Minn. L. Rev.* 1343.
[45] Mark Tushnet, "Public Law Litigation and the Ambiguities of *Brown*" (1992) 61 *Fordham L. Rev.* 23.

examples of judges becoming prison administrators, but the judicial role was much more nuanced. As contemplated in *Brown II*, courts would often ask the executive to devise remedial plans. When judges did not have the necessary information, they appointed expert administrators to act as masters or receivers to collect and analyse the needed information.[46] Following equitable traditions, courts were also prepared to modify their remedies if they had unanticipated consequences or if conditions changed. The Court allowed remedies that were designed to prevent violations, such as a thirty-day limit on solitary confinement,[47] rather than respond to the harms caused by the past violations. There was also an increasing trend toward consent decrees where courts approved and enforced remedial plans agreed to by the parties. The incremental reform achieved in these cases was done on the back of established rights violations that caused many prisoners to suffer and die in appalling prison conditions.

The opposition to complex prison litigation resulted in legislative backlash. Congress, with bi-partisan approval in 1996, enacted legislation that limited damage and injunctive remedies in cases brought by prisoners.[48] It limited one particularly unpopular remedy – the release of prisoners from overcrowded prisons. Under the legislation, only a special three-judge panel could order such a remedy and only if other remedies had been tried and failed. Judges were instructed to give substantial weight to public safety when making release decisions.[49] This continues the exceptional American practice of ordinary legislation restricting the remedies available for constitutional violations.[50] These legislative restrictions on judicial remedies were upheld from constitutional challenge.[51] They were successful in reducing prison litigation. In the early 1980s, 51 per cent and 43 per cent of prisoners in local and state prisons respectively were in institutions subject to judicial decree. By the mid-

[46] For an overview of these cases, see Malcolm Feeley and Edward Rubin, *Judicial Policy-Making and the Modern State* (Cambridge: Cambridge University Press, 1998).
[47] *Hutto* v. *Finney*, 437 US 678 (1978) (approving thirty-day limit on solitary confinement).
[48] Prison Litigation Reform Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321, 1367–1368 (18 U.S.C. § 3626 (a) and (b) (2012)).
[49] 18 U.S.C. § 3626.
[50] It is also true that legislation sometimes encourages injunctions and other remedies, often by litigation by the Department of Justice. See Civil Rights Act of 1964, Pub. L. 88–352 Title IV; Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub. L. 103–322 Title XXI.
[51] *Miller* v. *French*, 530 US 327 (2000).

2000s, only 20 per cent and 22 per cent of those in local and state prisons were subject to judicial supervision.[52]

7.2.1.4 Diminishing Enthusiasm for Public Law Litigation The American courts have demonstrated diminishing enthusiasm for public law litigation. The Court has warned trial judges not to become "enmeshed in the minutiae of prison operations".[53] It disapproved of the use of special masters and instead indicated that the executive itself should propose plans to respond to deficiencies in prisons.[54] In 1992, the Court categorically ruled out preventive or prophylactic remedies that went beyond constitutional entitlements by declaring: "[f]ederal courts may not order state or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated".[55] This fit into the pattern also seen in school desegregation cases of courts using the corrective requirement of remedies being defined by the scope of the violation to limit injunctions.

The Court has stressed that "federal supervision of local school systems was intended as a temporary measure".[56] This drew a dissent from Justice Marshall, who argued that "the continued need for a decree" should "turn on whether the underlying purpose of the decree has been achieved".[57] Finally, the US Supreme Court has suggested that because of their effects on the separation of powers and federalism, structural injunctions aimed at institutions should be terminated earlier than injunctions addressing less complex issues.[58] This wrongly assumes that the more difficult task of systemic reform could be achieved more quickly than the simpler task of preventing or repairing more limited rights violations.

7.2.1.5 The California Prison Case In 2011, the US Supreme Court in a bitterly divided 5–4 decision upheld a decision of a special three-

[52] Margo Schlanger, "Trends in Prison Litigation, as the PLRA Enters Adulthood" (2015) 5 *U.C. Irvine L. Rev.* 153, 169.
[53] *Bell* v. *Wolfish*, 441 US 520 (1979) at 526.
[54] *Lewis* v. *Casey*, 516 US 804 (1996).
[55] *Ruffo* v. *Inmates of Sufolk County Jail,* 502 US 367 (1992) at 389. In 1978, the Court had earlier held that courts did not err in imposing a thirty-day limit on solitary confinement as a means to prevent cruel and unusual punishment: *Hutto* v. *Finney*, 437 US 678 (1978).
[56] *Board of Education* v. *Dowell,* 498 US 237 (1991) at 248.
[57] Ibid. at 267.
[58] *Horne* v. *Flores*, 557 US 433 (2009); see generally Jason Parkin, "Aging Injunctions and the Legacy of Institutional Reform Litigation" (2017) 70 *Vanderbilt L. Rev.* 167.

judge panel that California be required to reduce in two years its prisons to 137.5 per cent capacity. The plaintiffs and some of the state's own experts supported a reduction to 130 per cent capacity, while a state panel recommended a less drastic reduction to 145 per cent capacity. The three judge panel split the difference. The Supreme Court upheld this exercise of remedial discretion, noting that there are "no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort".[59] In his dissent, Justice Scalia denounced the prisoner reduction order as "the most radical injunction issued by a Court in our nation's history" that would release "46,000 convicted criminals".[60]

The above description of the case might suggest that the California case was, like many other prison cases, about prison overcrowding. It was not. The California case merged two earlier lawsuits that alleged a failure of adequate healthcare in prisons leading to many documented premature and avoidable deaths of prisoners. The population reduction order expanded what was already a complex and polycentric problem involving struggles to hire more doctors and nurses and provide better facilities and funding for prison healthcare. The prison reduction remedy implicated virtually all of California's criminal justice system including its use of mandatory sentences and the interplay of state and local prisons. For example, California's criminal justice realignment has seen increased crowding in jails run by fifty-eight counties that were not included in the decree.[61] Nevertheless, the majority of the Supreme Court accepted the polycentric nature of the issue and held that it justified expanding the lawsuit into overcrowding issues. Justice Kennedy concluded: "[o]nly a multi-faceted approach aimed at many causes, including overcrowding, will yield a solution".[62] It will be suggested in Section 7.3 of this chapter, however, that the Court bit too deeply into the polycentric pie in this case and lost sight of the prisoners and their claims that they suffered inadequate healthcare.

As of November 2020, the case is still subject to judicial supervision. The 137.5 per cent population cap was achieved in 2015. Nevertheless, concerns about the adequacy of healthcare facilities and inadequate

[59] *Brown* v. *Plata*, 131 S.Ct. 1910 (2010) at 541.
[60] Ibid. at 550.
[61] Margo Schlanger, "Plata v. Brown and Realignment: Jails, Prisons, Courts and Politics" (2013) 48 *Harv. C.R.-C.L. L. Rev.* 145.
[62] Ibid. at 526.

suicide prevention remain.[63] An application for emergency relief related to COVID-19 has been denied.[64] Some scholars, such as Jonathan Simon, have praised *Brown* v. *Plata* as a remedy that addresses mass incarceration.[65] Others, however, point out that one possible response to caps on overcrowding has simply been to build new prisons.[66] What gets lost in this debate is the original complaint of the prisoners in the California case: inadequate physical and mental healthcare. It will be suggested below that Indian public law cases also demonstrate some of this same sense of drift in the search for systemic remedies that do not focus on the plight of individuals. Fortunately, there are other prison cases, including from supra-national courts, that combine individual and systemic remedies.

7.2.2 *The European Court of Human Rights*

The ECtHR takes a more deferential approach to prison reform than the American courts. It does not have the power to threaten contempt or even impose fines as a form of punitive damages if states do not comply with its judgements.[67] In a 2012 pilot judgement case (designed to respond to repetitive cases), the Court acknowledged, as in the California case, that overcrowding was at the root of the problem of poor prison conditions in Russia. Nevertheless, it stressed that the Court "does not have the capacity, nor is it appropriate to its function as an international court, to involve itself in detailed reforms".[68]

These issues would be resolved by negotiations conducted by the Committee of Ministers. The Court imposed deadlines of six and twelve months for Russia to submit reform plans including effective domestic remedies. Consistent with the two-track approach, these domestic laws would include both compensatory and preventive remedies. The Court awarded individual measures of €2,000 and €13,000 to the applicants

[63] *Coleman* v. *Brown*, 922 F. Supp. 2d 1004, 1008 (E.D. Cal./N.D. Cal., 2013).
[64] *Plata* v. *Newsom,* 2020 WL 1675775 (N.D. Cal., 2020); *Plata* v. *Newsom*, 2020 WL 1908776 (N.D. Cal., 2020).
[65] Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of American Prisons* (New York: New Press, 2014).
[66] Joshua Guetzkow and Eric Schoon, "If You Build It, They Will Fill It: The Consequences of Prison Overcrowding Litigation" (2015) 49(2) *L. & Soc. Rev.* 401.
[67] *Varnava and Others* v. *Turkey* [GC], No. 16064/90, [2009] V ECHR 13 at para 223.
[68] *Ananyev and Others* v. *Russia* [GC], Nos. 42525/07 and 60800/08, ECHR First Section Judgment, 10 January 2012 at paras 194, 214–231.

who were vulnerable because of health conditions.[69] The Court also refused to suspend similar cases under the pilot judgement procedure because of the seriousness of the violations and the need to "remind the respondent state on a regular basis of its obligations under the Convention".[70] The Committee of Ministers closed its examination of the case in December 2018. It noted that €763 million would be spent on prison upgrades. Moreover, steps had been taken to reduce pre-trial detention and implement domestic provisions providing for both compensatory and preventive remedies.[71] Some of the systemic remedies adopted by Russia were similar to those implemented by California in the wake of the prison reduction order. An important difference, however, is the use of individual remedies both in the ECtHR's judgement and in the reform legislation that Russia introduced. These individual remedies mean that should the Committee of Ministers have prematurely terminated its supervision that both Russian courts and eventually the ECtHR could award individual and systemic remedies for prison conditions, thus triggering another two-track cycle of reform.

In a case involving solitary confinement, the ECtHR ordered €10,000 in damages to a prisoner who had been held in solitary confinement from 1994 to 2006. Such an award is in itself inadequate given the profound damage caused by solitary confinement. The petitioner was also released after the judgement. The systemic response by France as supervised by the Committee of Ministers involved a combination of judicial, legislative and administrative measures limiting and regulating solitary confinement. The French courts expanded appeal rights and directed judges to inquire about the effects of solitary confinement on prisoners. Three legislative amendments were introduced limiting solitary confinement. Both lawyers and prison administrators were provided with copies of judgements and training on the new legal regime. The Committee of Ministers closed supervision on the basis that France's domestic remedies were now adequate.[72] As discussed in Chapter 1, Section 1.8, this case

[69] Ibid.

[70] Ibid. at para 236.

[71] *Ananyev and Others* v. *Russia* [GC], Nos. 42525/07 and 60800/08, ECHR Enhanced Procedure, online: https://hudoc.exec.coe.int/eng#{"EXECIdentifier":["004-14142"]}

[72] *Ramirez-Sanchez* v. *France*, No. 59450/00, Execution of the Judgment of the European Court of Human Rights, Ramirez Sanchez against France Judgment of 4 July 2006, Resolution CM/ResDH (2010)162, Adopted by the Committee of Ministers on 2 December 2010.

shows how supra-national concerns about respecting subsidiarity can dovetail with respect for the separation of powers.

The end of supervision by the Committee of Ministers in this and other prison cases is no guarantee of effectiveness going forward. A difference from the California case is that the willingness of courts to order individual remedies provides some safeguard should prison conditions not improve or worsen over time. The European cases allow the state to propose and implement a broad range of legislative and administrative remedies, albeit subject to supervision and publicity by the Committee of Ministers. They are also more concerned than the American case that individual applicants receive remedies including appropriate medical treatment when necessary.[73] Some of these orders have been by way of interim remedies.[74] The Committee of Ministers has visited prisons in some cases to verify that individual prisoners receive required medical treatment.[75] The European experience suggests that it is possible to combine individual and systemic remedies in combatting poor prison conditions.

7.2.3 *The Inter-American Court of Human Rights*

The IACtHR combines both individual and systemic remedies in its institutional cases. Unlike the ECtHR, the IACtHR monitors compliance with its own rulings, often issuing lengthy judgements years after the initial ruling,[76] as well as playing a mediating role in some closed

[73] *Tekin Yildiz* v. *Turkey* (1998), 52/1997/836/1042, ECHR 9 June 1998 at paras 62–66; *Dybeku* v. *Albania,* No. 41153/06, ECHR 18 December 2007 at paras 63–64, 41; *Kotsaftis* v. *Greece*, No. 39780/06, ECHR 12 June 2008 at para 50; *Slawomir Musial* v. *Poland,* No. 28300/06, ECHR 20 January 2009 at *Holds* para 4; *Gülay Çetin* v. *Turkey,* No. 44084/10, ECHR 5 March 2013 at paras 102–103; *Contrada* v. *Italy (No. 2)*, No. 7509/08, [2014] ECHR 142 at paras 97–103; *Mozer* v. *Moldova and Russia* [GC], No. 11138/10, ECHR 23 February 2016 at paras 225–235, 178.

[74] *Kondrulin* v. *Russia*, No. 12987/15, ECHR 20 September 2016 (finding that Russia breached interim measure under Rule 39 and subsequently Article 3 of the European Convention); *Aleksanyan* v. *Russia,* No. 46468/06, ECHR 22 December 2008; *Salakhov and Islyamova* v. *Ukraine,* No. 28005/08, ECHR 14 March 2013 at paras 216–224.

[75] Resolution CM/ResDH(2019)327, Six Cases against Italy, Adopted by the Committee of Ministers on 5 December 2019.

[76] *Baena-Ricardo et al.* v. *Panama* (2003), Judgment (Competence), Inter-Am. H.R (Ser. C), (28 November 2003) at paras 72–73, online (pdf): https://iachr.lls.edu/sites/default/files/iachr/Court_and_Commission_Documents/Baena-Ricardo%20et%20al.%20v.%20Panama.Competence.11.28.03.pdf Compliance hearings "can assist the Court in understanding the problems and challenges arising for the state in attempting to comply with

implementation sessions.[77] Also unlike the ECtHR, the IACtHR orders symbolic forms of reparation such as commemoration and public acknowledgements of responsibility.

Only five of eighty complex cases classified by Alexandra Huneeus to be the equivalent of structural injunctions have resulted in full compliance. Many of these problems relate to orders that require domestic prosecutors and courts to conduct investigations.[78] Professor Huneeus also notes that complex cases make up about a quarter of the IACtHR's contentious cases,[79] whereas estimates of complex cases under Article 46 of the European Convention range from 2 to 6 per cent of the ECtHR's much larger case load.[80] Professor Huneeus notes that the IACtHR involves the victims much more than does the European court. As she concludes, "the victim's participation could be viewed as a type of remedy in itself, and as a form of procedural justice".[81] Involving the victims of rights violations is good practice in all institutional cases. It can help counter the possibility that systemic remedies will not be responsive to the concerns of those who are meant to benefit from the remedy. Those who have had their rights violated have their own expertise that can supplement that of lawyers, judges, masters and bureaucrats.

One troubling pattern for the two-track approach is that governments are often more willing to pay damages to victims than to undertake more ambitious systemic reforms.[82] For example, Honduras paid US$123,000

its orders, as well as giving the opportunity to state authorities to put human faces to cases and better understand victims' views and situations." Clara Sandoval, Philip Leach and Rachel Murphy "Monitoring, Cajoling and Promoting Dialogue: What Role for Supranational Institutions in the Implementation of Individual Decisions?" (2020) 12 *J. of H.R. Prac.* 71 at 83.

[77] Huneeus, "Reforming the State from Afar", 31.

[78] Ibid., 36.

[79] Ibid., 15.

[80] Alice Donald and Anne-Katrin Speck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments" (2019) 19(1) *Hum. Rts. L. Rev.* 83, 88.

[81] Huneeus, "Reforming the State from Afar", 37. See also Antkowiak and Gonza, *The American Convention on Human Rights* (New York: Oxford University Press, 2017), p.313; see also Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 2nd ed. (Cambridge: Cambridge University Press, 2013), pp.305–306 also noting low compliance with court orders for investigations.

[82] *Ximenes Lopes* v. *Brazil* (2006), (2017) 40(3) *Loy. L.A. Int'l & Comp. L. Rev.* 1371 (damages paid but not training or investigation after a death in a mental hospital); *Velez Loor* v. *Panama* (2010), (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev.* 1143 (US$50,000 in damages paid but no compliance with general measures to separate immigration detainees from criminal detainees or improve conditions of detention); *Pacheco Teruel et al.* v. *Honduras*

in damages, but almost thirteen years after the original 2006 judgement had not complied with other remedial orders to investigate and improve prison conditions.[83] Sometimes, the state does not even pay damages. In a case involving fires and shootings that killed ten detainees and injured others in Paraguay, the Court awarded US$3.5 million in damages. It also ordered Paraguay to provide treatment and formulate a new policy with respect to youth in trouble with the law. Four years after the judgement, the Court found that only 18 per cent of the damages were paid and an overall lack of compliance with the systemic orders. The Court continues to supervise the case but young prisoners continue to die in the juvenile facility because of fires and use of force.[84] The Court has at least owned up to this remedial failure in its three follow-up judgements on compliance.

At the same time, it would be wrong to conclude that the IACtHR's general measures are never effective. Sometimes, even partial compliance can serve a valuable purpose. For example, Guatemala enacted new prison legislation paying more attention to rehabilitation after the Court had found a lack of compliance in two follow-up judgements.[85] In one case, the Court found compliance with general measures directed towards improving conditions of confinement in a specific prison and enactment of new prison legislation that complied with human rights standards. The Court also found compliance with respect to individual remedies for an American citizen wrongly convicted of terrorism.[86] In a Colombian case dealing with torture of prisoners, the state paid almost US$500,000 in damages, started criminal proceedings against one official, strengthened oversight and trained prison doctors.[87] Like the ECtHR, the IACtHR seems committed to both individual and systemic remedies in individual cases.

7.2.4 *India*

India was the first country to embrace public law litigation on the American model. Despite the Indian Supreme Court's embrace of

(2012), (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev.* 1771 (referring to friendly monetary settlement but not reporting compliance on various general measures designed to improve prison conditions).

[83] *López Álvarez* v. *Honduras* (2006), (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev.* 2053.

[84] *Juvenile Re-education Institute* v. *Paraguay* (2004), (2016) 38 *Loy. L.A. Int'l. and Comp. L. Rev.* 1446.

[85] *Fermín Ramírez* v. *Guatemala* (2005), (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev.* 2143.

[86] *Lori Berensen Mejia* v. *Peru* (2004), (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev.* 2609.

[87] *Gutiérrez Soler* v. *Colombia* (2005), (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev.* 1325.

public interest litigation, its ability to achieve meaningful remedies has been challenged. Upendra Baxi has noted that a 1986 case famous for recognizing housing rights nevertheless authorized evictions.[88] Anuj Bhuwania has criticized public interest litigation as a "slum demolition machine"[89] with those being evicted sometimes not even being made parties to the case and without provision of alternative accommodations. The editors of the 2016 *Oxford Handbook of the Indian Constitution* concluded that "the grandiosity of constitutional doctrine is not matched by the strength of remedies".[90]

The Supreme Court of India has recognized public interest litigation as "essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them".[91] The reference to cooperation and collaboration is consistent with what Abram Chayes identified in 1976 as one of the defining features of public law litigation in the United States: namely, that the remedy was often negotiated as opposed to being deduced from the rights violation or imposed by the judge.

In a 1988 case involving conditions of juvenile detention, the Supreme Court stated that it would proceed cautiously in recognition that "unduly harsh and coercive measures against the States and the authorities might themselves become counter-productive. In the matter of affirmative action, the willing co-operation must, as far as possible, be explored . . . The coercive action would, of course, have to be initiated if persuasion fails".[92] In a 1996 prison case, the Court only provided vague directions to the government to consider a variety of reform proposals prepared by the Law Commission and other bodies.[93] This approach to remedies can, however, reduce the status and legitimacy of the court to one of an advisory body.

[88] Upendra Baxi, "Law, Politics and Constitutional Hegemony" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) in reference to *Olga Tellis* v. *Bombay*, (1986) 3 SCC 545.

[89] Bhuwania, *Courting the People*, pp.80, 85–87.

[90] Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, "Locating Indian Constitutionalism" in Choudhry, Khosla and Bhanu Mehta, *The Oxford Handbook,* p.9.

[91] *People's Union for Democratic Rights* v. *Union of India,* (1982) 3 SCC 235 at para 2.

[92] *Sheela Barse* v. *Union of India*, (1988) AIR 2211 at 2219.

[93] *Shri Rama Murthy* v. *State of Karnataka*, [1996] INSC 1660.

Another concern is the lack of participation by those whose rights have been violated and whom are supposed to benefit from the remedy. A 2018 case dealing with allegations of inhumane conditions in 1,382 different prisons was initiated by a letter from a former Supreme Court Justice. The Supreme Court directed the creation of an investigative commission headed by a retired Supreme Court Justice. Although much of the judgement dealt with the conditions for paying the judges who would conduct the investigation, the Court defended public interest litigation as giving "a voice to millions of marginalized Sections of society, women and children. Public interest litigation is one of the more important contributions of India to jurisprudence".[94] Although the procedural flexibility of Indian public law litigation has been defended as necessary to allow the poor to initiate cases, it can also be used in a way to maximize the interests of judges and amicus curia who belong to a very different class than those the remedy is supposed to benefit.[95]

In the 2018 prison case, the Indian Court focused on reducing overcrowding in prisons to 150 per cent capacity. It also ordered the creation of committees to limit the number of pre-trial detainees and recognized the need to fill over 27,000 vacant prison guard positions and improve access to medical facilities in prison. This followed the exclusively systemic approach taken in the California prison case. As will be discussed in Section 7.5.2, however, this case did move towards an individual first-track remedial approach when it ordered that courts investigate and, when appropriate, award damages for wrongful deaths in prisons.

In a 2015 case finding police torture, the Supreme Court issued quasi-legislative remedies,[96] such as ordering seven states to create human rights commissions. It also ordered the state to conduct investigations in cases involving death in custody.[97] Other orders made in the case, such

[94] *In Re: Inhuman Conditions in 1382 Prisons* v. *State of Assam* (2018), 18545/2013, (10) SCJ 35 at para 3.

[95] Jamie Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37(3) *Amer. J. of Comp. Law* 495. On the use of the Supreme Court's power to initiate public law litigation on its own motion see Marc Galanter and Vasujith Ram "Suo Moto Intervention and the Indian Judiciary" in Gerald Rosenberg, Shishar Bail and Sudhir Krishnasawmy (eds.), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge: University of Cambridge Press, 2019) at 117.

[96] Surya Deva, "Public Interest Litigation in India" in Po Jen Yap and Holning Lau (eds.), *Public Interest Litigation in Asia* (London: Routledge, 2011), p.67.

[97] *Shri Dilip K. Basu* v. *State of West Bengal & Ors.*, [2015] INSC 508.

as requiring police to wear identifying badges and to install video cameras, seem more workable. The Court focused exclusively on guidelines to regulate the police without attention to the need for compensatory remedies for victims of police abuse.[98] To be sure, even partial compliance with some of the many systemic remedies ordered by the Indian Supreme Court could have considerable benefits.[99] Nevertheless, much Indian public law litigation focuses on systemic reforms without providing immediate or individual remedies. Nor do the cases always appear to be responsive to the concerns of those who are meant to benefit from the remedies.

7.2.5 South Africa

Like the Supreme Court of Canada,[100] the Constitutional Court of South Africa originally expressed a preference for declaratory relief. It overturned supervisory injunctions in two early cases dealing with housing and access to life-saving medicine.[101] In a case dealing with violence on commuter trains, the Court rejected a request to retain jurisdiction. It explained that "declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed".[102] The Court's decision not to retain jurisdiction in these early cases did not seem sensitive to the gravity of the harms of remedial failure.

The Court in the *Treatment Action* case upheld the ability of courts to retain supervisory jurisdiction if necessary to ensure an effective remedy. The Court suggested that retention of jurisdiction was not necessary in the particular case involving the supply of drugs to stop mother to child

[98] *People's Union for Civil Liberties* v. *State of Maharashtra* 2014, MANU/SC/0882/2014.

[99] Gerald Rosenberg, Shishar Bail and Sudhir Krishnasawmy, "Neither a Silver Bullet Nor a Hollow Hope" in Gerald Rosenberg, Shishar Bail and Sudhir Krishnasawmy (eds.), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge: University of Cambridge Press, 2019), pp.350–351.

[100] *Eldridge* v. *British Columbia,* [1997] 2 SCR 13; Kent Roach, "Remedial Consensus and Challenge: General Declarations and Delayed Declarations of Invalidity" (2002) 35 *U.B.C. Law Rev.* 211.

[101] *Government of the Republic of South Africa and Others* v. *Grootboom and Others*, 2000 (11) BCLR 1169 (CC); *Minister of Health* v. *Treatment Action Campaign (No. 2)*, [2002] ZACC 16.

[102] *Rail Commuters Action Group* v. *Transnet Ltd t/a Metrorail,* (2005) (2) SA 359 (CC) at para 108.

HIV transmission because governments had always followed declarations. As Geoff Budlender and I have argued elsewhere, this ignored that governments may fail to comply with rights because of incompetence and not simply defiance.[103] Incompetence is not, as some have suggested, a psychological state.[104] Rather, it is the frequent failure of large bureaucracies to comply with human rights because of a lack of resources and training. Governments may also fail to comply if the scope of the declaratory relief is too limited or too vague.

The Constitutional Court's failure to retain jurisdiction in *Treatment Action* (as the trial judge had) was a mistake. Commentators have observed that the implementation was "patchy at best". In some provinces, compliance did not start until there was litigation threatening contempt of court. Problems remain with the lack of programs to encourage mothers to get tested for HIV. Over 64,000 babies had HIV four years after the decision.[105] The costs of remedial failures in this case were especially grave.

In some subsequent cases, South African courts have retained jurisdiction. Following the original model in *Brown II*, they have required responsible officials to report back to the Court about their plans to facilitate prisoner voting[106] or the commutation of death sentences.[107] In a 2011 housing right case, the Court similarly required the municipality to file a report with the court by a specific date about the provision of alternative housing. Consistent with the adversarial process, it allowed the applicant to file a competing report.[108] In other housing rights cases that will be examined in Chapter 8, Section 8.2.6, the Court retained jurisdiction to provide the parties an opportunity to negotiate a systemic

[103] Kent Roach and Geoff Budlender "Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable" (2005) 122 *S.A. L. J.* 325.

[104] Helen Taylor, "Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation" (2019) 9 *Constitutional Ct. Rev.* 247, 252.

[105] Amy Kapczynski and Jonathan M. Berger, "Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa" in Deena Hurwitz and Margaret Slaitterwaite, *Human Rights Advocacy Stories* (New York: Foundation Press, 2009), p.70.

[106] *August and Another* v. *Electoral Commission and Others*, [1999] ZACC 3 at para 39; *Minister of Home Affairs* v. *National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others,* [2004] ZACC 10 at *Order* para 5.

[107] *Sibyia and Others* v. *Director Public Prosecutions: Johannesburg High Court and Others*, [2005] ZACC 6 at *Order* paras 2–6; *Sibiya and Others* v. *Director Public Prosecutions* [2006] ZACC 22 at paras 1–3.

[108] *Nthabiseng Pheko Occupiers of Bapsfontein Informal Settlement* v. *Ekurhuleni Metropolitan Municipality*, [2011] ZACC 34.

remedy. This is consistent with Chayes' understanding of public law litigation as well as a new emphasis on participation by those who are supposed to benefit from the remedy.

In one case, a trial judge ordered the government to provide drugs to HIV-positive prisoners.[109] The judge ordered that the government submit a plan to the court that could be commented upon by the applicants. The judge also subsequently made an interim order requiring the drugs to be supplied. On appeal, the Court noted that the government's appeal was unlikely to succeed given that the plaintiffs had established a risk of irreparable harm. The Court also noted an affidavit filed on behalf of the prisoners detailing unnecessary deaths in prison from HIV-related causes. Justice Nicholson threatened contempt against some of the respondents that had not complied with the trial judge's orders and indicated that judges might have to resign if the central government was responsible for non-compliance.[110] A settlement between the parties occurred after the judgement.[111] The threat of contempt and even resignation seemed to have worked.

In recent years, South African courts have had to deliver on threats of punishment. In multiple cases involving contracting out social security payments, the Court issued a series of structural interdicts. A 2014 case would have supervised a new tendering process and placed various conditions on the government, such as no disruption of existing grants and respect for the privacy of personal data.[112] This case also recognized the reality of remedial delay. Justice Froneman observed: "a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between".[113]

[109] On poor prison conditions in South Africa but the general lack of public interest litigation, see Rudolph Jansen and Emily Tendayi Achiume, "Prison Conditions in South Africa and the Role of Public Interest Litigation since 1994" (2011) 27(1) *S.A J. Hum. Rts.* 183.

[110] *N and others* v. *Government of Republic of South Africa and Others (No. 1),* 2006 (6) SA 543 (D) at para 33.

[111] Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Claremont, South Africa: Juta, 2010), pp.431–432.

[112] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* v. *Chief Executive Officer of the South African Social Security Agency and Others (No. 2),* [2014] ZACC 12.

[113] Ibid. at para 39. The Court also stressed the importance of giving the parties continued access to the court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others* v. *Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2015] ZACC 7.

Rather than hold a new tendering process for private service providers, the government took over the distribution of payments and the Court ended its supervision. The government struggled to administer social security. The Court found another constitutional violation, but suspended the declaration of invalidity for a twelve-month period. During that time, social benefits had to be paid and the government was required to report to the Court every three months on its progress.[114] This approach, like that taken in Canada's *Reference re Manitoba Language Rights,*[115] demonstrates how a suspended declaration of invalidity requires a court to retain jurisdiction and to monitor and assist in the compliance process.

The South African court had continuing concerns about the government's performance. It hence appointed an auditor to monitor the payments of the grants.[116] The Court was candid that its new activism was "extraordinary" and only justified by "the very real threatened breach of the right of millions of people to social assistance . . . It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits".[117] In this case, the Court was faced with a recalcitrant government as demonstrated by its requirement that the responsible Minister personally pay 20 per cent of the costs to the successful applicants and be considered for possible perjury prosecutions.[118]

In a 2019 case, the Constitutional Court upheld a lower court's order that granted a special master extensive powers to develop a plan and its budget for court approval with respect to land reform. The Court recognized that such a remedy was novel. Justice Cameron appealed to a

[114] See also *South African Social Security Agency and Another* v. *Minister of Social Development and Others*, [2018] ZACC 26 for an extension of an additional six months subject to exacting conditions.

[115] [1985] 1 SCR 721; supplemental reasons [1985] 2 SCR 347; [1990] 3 SCR 1417; [1992] 1 SCR 212. After declaring that most of Manitoba's laws were unconstitutional because they were only enacted in English, the Court retained jurisdiction for seven years and issued several supplementary decisions elaborating on the extent of Manitoba's obligations to translate laws into French. See generally Roach, Constitutional Remedies, paras 13.460–13.570.

[116] *Black Sash Trust* v. *Minister of Social Development and Others (Freedom under Law NPC Intervening)*, [2017] ZACC 8.

[117] Ibid. at paras 43, 51.

[118] *Black Sash Trust* v. *Minister of Social Development and Others (Freedom under Law NPC Intervening)*, [2018] ZACC 36 at paras 17–18. The Court held that such an order did not violate the separation of powers and would be governed by tests of bad faith and gross negligence.

flexible understanding of the separation of powers: "[i]n cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive". The judge elaborated that "when egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief". In other words, the judicial role expands in response to "crises in governmental delivery, and not any judicial wish to exercise power".[119] The Court noted that American courts had frequently used special masters in public law litigation. Such experts may assist with either devising a remedial plan or implementing it. In implementing a remedy, the main task of a special master was to monitor rather than replace the executive.[120] Two judges of the Court, while also approving the use of special masters, concluded that determining the required budget was an executive function that should not be exercised by the court or its special master.[121]

There are signs that the South African courts are becoming more prescriptive and punitive in their approach to public law litigation. This may be warranted in the face of bureaucratic dysfunction, political neglect and intransigence.[122] At the same time, more prescriptive approaches that involve special masters may leave less room for the parties and others to shape the remedy.

7.2.6 *Australia*

In a case under the Victorian Charter of Rights and Freedoms, a judge not only issued declarations that the detention of juvenile offenders at an adult facility was unlawful but also issued prohibitive and mandatory injunctions prohibiting such detention and requiring transfer to a juvenile detention facility.[123] The judge was aware that the youth system

[119] *Mwelase and Others* v. *Director-General for the Department of Rural Development and Land Reform and Another*, [2019] ZACC 30 at para 48. See also Chapter 1, Section 1.8, for a similar discussion of the need for a flexible approach to the separation of powers.

[120] Ibid. at para 58.

[121] Ibid. at paras 104–108; see also Taylor, "Forcing the Court's Remedial Hand".

[122] One commentator has suggested that these recent cases "are best understood as remedial mechanisms aimed at addressing institutional dysfunction and political blockages that threaten rights at a systemic level, rather than punitive measures targeting the recalcitrance of individual public officials". Taylor, "Forcing the Court's Remedial Hand", 252.

[123] *Certain Children* v. *Minister for Families and Children & Ors (No. 2),* [2017] VSC 251 at para 585.

was at capacity. The judge nevertheless questioned why the government had not devoted more resources to avoid what happened. The judge also restrained the prison authorities from using pepper spray on inmates until they had developed policies and guidelines on its use. The latter moves in the direction of a structural injunction but in ways that rely on the expertise of the executive and does not provide for any comment or participation by others. It also suggests that public interest litigation may emerge even in jurisdictions not known for judicial activism.

7.2.7 Summary

Public law litigation started in the United States with *Brown II* but has spread to many other democracies and even to supra-national courts. It does not involve judges running schools and prisons but rather fashioning remedies based on recommendations by the parties and sometimes by experts appointed as special masters. One danger of this approach, however, is that attempts at systemic reform may not always be responsive to the concerns and priorities of those the remedy is meant to benefit. Both the ECtHR and the IACtHR engage in public law litigation, but take a two-track approach that combines individual and systemic remedies.

7.3 Polycentric Problems and the Separation of Powers

In Chapter 1, Section 1.3.2, Lon Fuller's evolving approach to the ability of courts to deal with polycentric problems was discussed. To summarize, Fuller was originally attracted to an idea that courts, because of their focus on rights and wrongs, were ill equipped to deal with problems that had unanticipated effects. Such distributive issues were best left to private ordering or legislative and administrative decisions. At the same time, Fuller recognized that courts (especially at the remedial stage) could facilitate "extracurial processes of political adjustment and compromise" by avoiding judicial rulings that were "too exacting and comprehensive". At the same time, the end result should be "acceptable to the court".[124]

Fuller's approach anticipated the work of Abram Chayes[125] who concluded that judges in complex cases often mediated the competing

[124] Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), p.178.
[125] Chayes, "The Role of the Judge".

claims of plaintiffs and governmental defendants. At the same time, Fuller, like Owen Fiss,[126] worried that judges who engaged in such mediation might lose sight of their obligations to adjudicate. Fuller warned that "courts have been instituted, not to mediate disputes, but to decide them . . . whereas mediation is directed toward *persons,* judgements of law are directed toward *acts*; it is acts, not people, that are declared proper or improper under the relevant provisions of law".[127]

Charles Sabel and William Simon recognize the polycentric nature of much litigation. They defend the ability of courts to address multiple issues "in a sequence determined in the course of problem-solving itself" so that over time judges address "reforms too complex to be addressed whole".[128] Their candid defence of public law litigation as destabilizing and experimental ignores Fuller's insight that much judicial legitimacy comes from focusing on remedying specific acts and wrongs – something that is the object of first-track remedies in my proposed two-track model.

Sabel and Simon are on firmer ground when they argue that the separation of powers critique of public law litigation is overly simplistic. In more recent work, Simon with colleagues has pointed out that courts face similar challenges in bankruptcy cases. In both cases, judges use their expertise in ensuring a fair process of dispute resolution between the stakeholders.[129] If such efforts to tackle polycentric problems are justified in bankruptcy, they should also be justified with respect to institutions that repetitively violate human rights.

The executive and the legislature are also involved in public law litigation. As Margo Schlanger has noted, officials in the executive are often happy to be the subject of public law litigation if it means they will receive adequate funds and training to do their jobs properly.[130] The American legislature has encouraged public law litigation in some contexts including with respect to the rights of the disabled and patterns and practices of police misconduct.[131] In other contexts, legislative and executive neglect and default may also help justify the court taking a more active role in managing an institution. Public law litigation is

[126] Owen Fiss, "The Forms of Justice" (1979) 93 *Harv. L. Rev.* 1.
[127] Lon Fuller, "Mediation – Its Forms and Functions" (1971) 44 *S. Cal. L. Rev.* 305, 328.
[128] Sabel and Simon, "Destabilization Rights", 1080.
[129] Noonan, Lipson and Simon, "Reforming Institutions".
[130] Margo Schlanger, "Beyond the Hero Judge: Institutional Reform Litigation as Litigation" (1999) 97 *Mich. L. Rev.* 6.
[131] Sandler and Schoenbrod, *Democracy by Decree*.

dialogic. It involves not only the judge but also the parties, including the executive.

Another objection to courts ordering remedies in institutional cases is that they will impact the polycentric budgeting processes of government. As the South African Constitutional Court has stated in the context of orders for temporary housing, the court's approach "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".[132] There cannot be meaningful remedies in the institutional context without courts confronting some polycentric issues that require resources.

Nevertheless, Fuller's criticisms of the ability of courts to grapple with polycentric issues still holds weight with many judges. It makes them reluctant to retain supervisory jurisdiction. For example, former Canadian Supreme Court Chief Justice Beverley McLachlin has stated that "the image of a judge making day to day operational decisions in the running of a school – down to what kind of tennis balls to order in one case – is hardly one most Canadian judges would embrace".[133] It is perhaps not surprising that Canadian judges have avoided retaining jurisdiction and issuing injunctions in prison cases. Instead, they have employed individual remedies, such as damages and habeas corpus, and more recently suspended declarations of invalidity and large class action awards with respect to solitary confinement eventually leading to the enactment of reform legislation.[134]

Retention of jurisdiction and asking for information and assistance from states and parties is much less a problem with international judges. This is perhaps because they recognize that the law they administer is not a matter of enforceable command. In addition, regional human rights

[132] *City of Johannesburg Metropolitan Municipality* v. *Blue Moonlight Properties 39 (Pty) Ltd & Another,* [2011] ZACC 33 at para 74.

[133] McLachlin, "The Charter: A New Role for the Judiciary", 552–553.

[134] *British Columbia Civil Liberties Association* v. *Canada (Attorney General),* 2019 BCCA 228 (declarations and suspended declarations of invalidity); *Canadian Civil Liberties Association* v. *Canada*, 2019 ONCA 243 (declaration of a fifteen-day limit on solitary confinement); *Pratt* v. *Nova Scotia (Attorney General)*, 2020 NSCA 39 (habeas corpus relief from solitary confinement); *Brazeau* v. *Canada* 2020 ONCA 184 (Can $ 20 million class action award in relation to harms caused by solitary confinement). The new reform legislation amends the corrections legislation. SC 2019 c. 27.

courts have a special interest in encouraging states to take actions to end repetitive violations that may swamp their limited resources in a way that domestic courts do not. In some ways, it is the comparative humility and dependence of international law judges that may make them more amenable to public law litigation. This is a paradox only to those who misconceive public law litigation as a simple act of judicial will and command.

7.3.1 The California Prison Case Re-visited

Although it is wrong to read Fuller as prohibiting all judicial encounters with polycentric problems, his cautions cannot be ignored. This allows us to revisit the California prison case discussed in Section 7.2.1.1.4. The lower court judgements provide much evidence about how courts could not avoid side issues such as the problems of attracting and retaining healthcare professionals in prisons. The mental healthcare case documented high numbers of prisoners with mental health issues and above average suicide rates. As late as 2018, the government was unsuccessfully appealing an order that it should transfer inmates to a mental health crisis bed within twenty-four hours of referral.[135] One judge justified putting the California prison system into receivership on the basis that it was "a textbook example of how majoritarian institutions sometimes fail to muster the will to protect a disenfranchised, stigmatized and unpopular subgroup of the population".[136] Three years later, however, 80 per cent of healthcare positions remained vacant.[137] It is clear that judges cannot turn away from such failing institutions that produce chronic rights violations.

My reservation about the California prison case is not that judges should not have retained jurisdiction or grappled with the polycentric issues involved in providing healthcare. It is that the three judge panel took on too much of the polycentric pie when they moved from the difficult task of improving prison healthcare to reducing prison capacity. This also subsequently applies to the majority of the United States Supreme Court. The move by both Courts introduced unnecessary side issues, such as whether prison release would threaten public safety. More fundamentally, however, it meant that California could eventually

[135] *Coleman* v. *Brown*, 756 Fed. Appx. 677 (9th Cir., 2018).
[136] As quoted in Simon, *Mass Incarceration on Trial*, p.107.
[137] Ibid., p.96.

comply with the Court's order that it reduce prison population to 137.5 per cent of capacity and still have prisons that provided inadequate healthcare that violated basic human rights.

The Court was not candid that it shifted to the prison reduction remedy because of failures to improve healthcare. This demonstrates a judicial reluctance to discuss or even admit remedial failure. The result was that prison reduction remedy was not responsive to the prisoners' original complaint. Courts that focus on ever widening circles of systemic reform may unintentionally lose sight of the underlying violations. They may also lose the legitimacy that comes from right to a remedy reasoning based in documented cases of horrific rights violations and the harm that they cause to specific litigants. The California prison case should have been about the unnecessary deaths of prisoners because of poor healthcare and not about the public safety effects of reducing the prison population.

The three-judge panel's 182-page judgement ordering the reduction to 137.5 per cent capacity focused on the question of whether the remedy was consistent with public safety.[138] Even the Supreme Court majority admitted that the public safety question, mandated by the terms of the Prisoner Litigation Reform Act, was speculative. A striking feature in reading the many judgements is how the aggrieved individuals – prisoners who needlessly died, suffered or committed self-harm because of inadequate mental healthcare – slid off the judicial and public radars. The voices of the prisoners and their needs and priorities were absent. My point is not that the courts cannot make rulings that affect polycentric policy issues, but only that they should be responsive to the rights violations that individuals have suffered.

Although overcrowding aggravates healthcare problems, the prison reduction remedy has distracted from the original focus on unnecessary deaths and suicides. Consistent with Fuller's claim that courts are at their best when dealing with allegations of rights and wrongs, the Court's judgement is most powerful when it occasionally goes beyond a sociological focus on public safety and a bureaucratic focus on healthcare metrics and examines the effects of cruel and unusual treatment on specific individuals. For example, Justice Kennedy notes that: a prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with "constant and extreme" chest pain died after an

[138] Ibid., p.112.

8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a "failure of MDs to work up for cancer in a young man with 17 months of testicular pain."[139]

Justice Alito in his dissent acknowledges these examples of "shockingly deficient medical care". He then attempts to dismiss them as mere "anecdotal evidence".[140] His approach ignores the task of the court in providing remedies for clear wrongs and rights violations. Justice Scalia in his dissent at least contemplated the possibility of individual remedies. He suggested that a judge could order the release of an individual prisoner if that was the only way the prisoner could obtain constitutionally required medical treatment.[141] As seen above, supra-national courts have employed such individual remedies alongside systemic remedies.

It remains an open and controversial question whether the courts were correct in concluding that the prison reduction remedy could be achieved without harming public safety. Even if the majority's predictions turn out to be correct, the case has expended both judicial resources and political capital on achieving a remedy that has not provided better healthcare for prisoners. There are also concerns that reducing the population of state prisoners has transferred some healthcare (and overcrowding) problems to local jails in fifty-eight different counties. It will be more difficult to achieve remedies for these problems on a county-by-county basis.

Courts can and must confront the polycentric issues raised by public law institutions that chronically violate rights. They should, however, be cautious and involve the parties in formulating workable and manageable remedies. They should be wary of taking on additional laudable systemic goals that are not responsive to the underlying rights violations and the priorities of those who are supposed to benefit from the remedy.

[139] *Brown* v. *Plata*, 131 S.Ct. 1910 (2010) at 1925. He also poignantly observed: "[t]wo prisoners committed suicide by hanging after being placed in cells that had been identified as requiring a simple fix to remove attachment points that could support a noose. The repair was not made because doing so would involve removing prisoners from the cells, and there was no place to put them". Ibid. at 1934. The majority opinion also includes three pictures, one showing a telephone-like cage that prisoners awaiting a mental health bed were locked into.

[140] Ibid. at 1962.

[141] He explained that: "if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release; but a court may not order the release of prisoners who have suffered no violations of their constitutional rights, merely to make it less likely that that will happen to them in the future". Ibid. at 1958.

Public law litigation that results in evictions (as in India) or that promotes prisons operating significantly over capacity without adequate healthcare (as in the United States) is evidence of public law litigation that has lost its way. It will be suggested in Section 7.5 that a two-track approach that combines individual and systemic remedies can help public law litigation stay on track.

7.4 The Declaration Plus

7.4.1 The Advantages of Declaratory Relief

As discussed in Chapter 1, Section 1.4.1, Edwin Borchard was a prime advocate for the declaratory remedy. The eventual acceptance of this remedy can be seen as another instance of domestic courts learning from the practice of supra-national courts. The declaration has emerged as a widely used remedy in both supra-national and national human rights law. Emily Chiang has argued that American litigators should make greater use of declaratory relief. She points to the increasing restrictions on injunctive relief and the ability of broad declaratory relief to establish more wide-ranging precedents than fact specific injunctions.[142] These are valid points, but they discount that declaratory relief has not involved the retention of jurisdiction and with that the capacity for the court to manage compliance.[143]

The declaration has become a preferred remedy in those cases where governments have a variety of options in terms of complying with human rights in the future. The Supreme Court of Canada has explained that "a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances".[144] In a case involving healthcare, the Supreme Court elaborated that "a declaration, as opposed to some kind of injunctive relief is the appropriate remedy in this case because there are a myriad of options available to the government that may rectify the unconstitutionality of the current system".[145]

[142] Emily Chiang, "Reviving the Declaratory Judgment: A New Path to Structural Reform" (2015) 63(3) *Buff. L. Rev.* 549.

[143] As recognized in Samuel L. Bray "The Myth of the Mild Declaratory Judgment" (2014) 63 *Duke L. J.* 1091 who, nevertheless, argues that declarations can be an important and meaningful remedy.

[144] *Mahe* v. *Alberta,* [1990] 1 SCR 342 at para 114.

[145] *Eldridge* v. *British Columbia,* [1997] 2 SCR 13 at para 96.

The South African Constitutional Court has made similar statements.[146] The United States Supreme Court has noted that declarations provide "a milder alternative to the injunction remedy".[147]

Declarations are often used as a dialogic device that allows the executive to decide what specific means to use to achieve the outcomes that courts have declared are required in order to comply with human rights. They assume that governments are both willing and competent to implement the declaration and that the declaration provides sufficient guidance about what should be done to comply with rights.

7.4.2 *The Disadvantages of Declaratory Relief*

The preference for declarations has not always worked despite somewhat complacent claims or assumptions by judges that Canadian and South African governments always comply with declarations.[148] For example, a judge in an early case declared solitary confinement to be cruel and unusual but provided no guidance about appropriate remedies.[149] Some of the corrective steps taken were perceived by prisoners as worsening their conditions.[150] After the Canadian government's delayed and lacklustre response to a declaration that it had violated the rights of Omar Khadr, a Canadian detained at Guantanamo Bay,[151] a trial judge held in follow-on litigation that the applicant had still not been given an effective remedy. The trial judge attempted to encourage consultation in the wake of general declarations by holding that the intended beneficiaries of the declaration have a legitimate expectation that the government will consult them. He then structured a plan submission process that allowed the

[146] *Rail Commuters Action Group* v. *Transnet Ltd t/a Metrorail,* (2005) (2) SA 359 (CC) at para 108.

[147] *Steffel* v. *Thompson*, 415 US 452, 467 (1974).

[148] *Minister of Health* v. *Treatment Action Campaign (No. 2)*, [2002] ZACC 16; *Khadr* v. *Canada (Prime Minister)*, [2010] 1 SCR 44.

[149] *McCann* v. *The Queen*, 1975 CanLII 1104 (FC).

[150] Michael Jackson, *Prisoners of Isolation* (Toronto: University of Toronto Press, 1980), pp.141–142.

[151] The Court reversed an injunction that Canada make a diplomatic request to the United States for Khadr's return. In reasoned that the injunction "gives too little weight" to the executives responsibility for "Canada's broader national interests" and that a declaration gives the government "a measure of discretion in deciding how to respond". *Khadr* v. *Canada (Prime Minister),* [2010] 1 SCR 44 at para 2. After a delay the government, which was opposed to Khadr's return to Canada, asked that the results of Khadr's interrogation by Canadian officials not be used in American military commission proceedings.

applicant to comment on the government's proposed course of action before the judge issued his final order, which could have included an injunction that the government ask the United States to return Khadr to Canada. The judge never issued that order because his judgement was stayed pending appeal and the appeal was declared moot after Omar Khadr pled guilty to an offence at Guantanamo in a successful attempt to be returned to Canada.[152] Declarations do not always get the job done and Khadr's self-help remedy by pleading guilty was a far more effective remedy than the Supreme Court's declaration. In its next case, the Canadian Supreme Court issued a mandatory order against a Minister to allow the operation of a safer injection site, but on the basis that this was the only result on the facts of the case that was consistent with human rights.[153]

A majority of the Supreme Court of Canada relied on declarations of past equality rights and freedom of expression violations in a case where customs officials had targeted and profiled imports to a small bookstore catering to sexual minorities. The majority denied the request that the Court retain jurisdiction concluding, "with some hesitation, that it is not practicable" to order "a more structured . . . remedy".[154] The Court noted that much time had elapsed since the trial judge's findings of fact and that a declaration about past violations would provide "a firm basis" should additional litigation be necessary. The declaration attempted to identify some of the causes of the past violations by singling out inadequate training of customs officials on the legal definition of obscenity as well as the failure to provide the bookstore with sufficient reasons and a speedy administrative appeal process.[155]

[152] *Khadr* v. *Canada (Prime Minister),* [2010] 4 FCR 36 decision stayed pending appeal [2012] FCR 396 and appeal declared moot; see generally Roach, Constitutional Remedies in Canada, p.12.810ff; Kent Roach, "The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases" (2010) 28 *N.J.C.L.* 115; Amir Attaran and Jon Khan, "Solving the 'Khadr' Problem: Retention of Jurisdiction- A Comparative Analysis" (2015) 34 *N.J.C.L.* 145.

[153] *Canada* v. *PHS Community Services* [2011] 3 SCR 134 at para 152.

[154] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice),* 2000 2 SCC 69 at para 157.

[155] Ibid. at para 156. One factor here may be that the bookstore originally only sought declaratory relief. They requested retention of jurisdiction after the trial judgement but this request was denied by the trial judge on the basis that customs was implementing a process toward the necessary reforms. The trial judge did, however, order that customs no longer impose a look-out on the store's imports: *Little Sisters Book and Art Emporium* v. *Canada*, (1996) 134 DLR (4th) 293 (BCSC).

Justice Iacobucci issued a strong dissent in the above case. He noted that while declarations were flexible and deferential to governments, they also suffer "from vagueness, insufficient remedial specificity, an inability to monitor compliance and an ensuing need for subsequent litigation to ensure compliance".[156] He warned that declarations that ended the court's jurisdiction over the case would be inadequate in cases where administrators "have proven themselves unworthy of trust".[157] His warnings proved prophetic. The customs bureaucracy continued to prohibit books ordered by the small bookstore. The bookstore was required to start new litigation. Unfortunately, the subsequent litigation was never decided on the merits because the bookstore was forced to abandon it after the Supreme Court ruled that it was not entitled to advanced costs to finance the costly litigation.[158] Again, the Supreme Court's use of a declaration seems not to have produced an effective remedy. At the very least, it did not resolve the dispute between the rights-holder and the government.

7.4.3 The Often Impossible Choice between General Declarations and Specific Injunctions

Owen Fiss has recognized that "in many situations, injunctions and declaratory judgments are functionally equivalent".[159] The difference is that injunctions can be enforced through punitive powers of civil or criminal contempt. This "gives the defendant, one more chance" while the declaration that has generally ended the court's involvement in the case "gives the defendant two more chances".[160]

Although Fiss downplays this because of his focus on structural injunctions,[161] injunctions may often not be appropriate because they require specificity to provide fair notice to the defendants. Although the

[156] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, 2000 2 SCC 69 at para 248.
[157] Ibid. at para 257.
[158] *Little Sisters Book and Art Emporium* v. *Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38.
[159] Owen Fiss, "Dombrowski" (1977) 86 *Yale L. J.* 1103, 1122.
[160] Ibid., 1124.
[161] He wrote that "[t]he issuance of the injunction is not so much a coercive act, such as issuing a command, as it is a declaration that henceforth the court will *direct* or *manage* the reconstruction of the social institution, in order to bring it into conformity with the Constitution. The first ploy of any manager is to induce collaboration; authoritative directives are reserved as a last resort". Fiss, *The Civil Rights Injunction*, p.37.

detailed command and controls of American structural injunctions have often been interpreted as imposing the will of the "heroic judge"[162] or the results of negotiation,[163] they are also a requirement of due process in relation to possible contempt sanctions. The result is that courts are often faced with a stark choice between a general declaration and a specific injunction.

In their influential 2004 article, Sabel and Simon have suggested that contemporary public law litigation has moved away from "command and control" to focus more on "flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability".[164] Despite some disputes about the accuracy of their account,[165] it is clear that specific orders, including the one in the California prison case, place considerable demands on the limited information and expertise of judges. They may also require the judge to delegate the details of the remedy either to the parties or a special master, thus making the process technocratic and perhaps divorced from the priorities of those the remedy is intended to benefit. Finally, they may also encourage the executive to observe only the letter of the injunction and not its broader spirit.[166] The attractive vision of a dynamic, transparent and dialogic approach to public law relief[167] can be advanced by a remedy that combines the generality and flexibility of declarations with the retention of jurisdiction that in most domestic systems only occurs when the court is prepared to order specific injunctions. I have called such a new remedy "the declaration plus".[168]

7.4.4 The Declaration Plus: A New Remedy between the Declaration and the Injunction

What is the declaration plus? It is a declaration that provides in general terms what is required to ensure compliance with rights while the court

[162] Schlanger, "Beyond the Hero Judge".
[163] Chayes, "The Role of the Judge".
[164] Sabel and Simon, "Destabilization Rights", 1019.
[165] Margo Schlanger, "Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders" (2006) 81 *N.Y.U. L. Rev.* 550, 623–626.
[166] Sabel and Simon, "Destabilization Rights", 1053.
[167] Public reporting and monitoring responds to concerns that a "controlling group" within the litigation will capture the litigation: Sandler and Schoenbrod, *Democracy by Decree*, pp.113–161.
[168] Roach, Constitutional Remedies in Canada, at 12.700ff.

retains jurisdiction and the ability to alter relief and resolve disputes arising from the declaration in a procedurally fair manner. The declaration plus may already be available under American federal law because of a provision that allows a plaintiff who obtains a declaration to return to court and have the court grant "further necessary or proper relief based on a declaratory judgment".[169]

A declaration plus would focus on broad outcomes and goals while leaving the means to achieve them subject to the state's decision. It would also allow for stakeholder participation in the form of comments and challenges to reports by the state to the court about its plans and progress. The declaration plus recognizes that judges will not generally have sufficient information or expertise to impose detailed relief. It also recognizes that judges rarely use their contempt powers.[170]

The declaration plus is motivated by the legal process aspiration to allow courts to do what they do best: elaborate the meaning of rights and respond to dynamic contexts in a procedurally fair and evidence-based manner. It also allows governments to do what they do best: use their expertise and resources to select the means to implement the general goals of rights compliance articulated by the courts. It also allows rights seekers to do what they do best: monitor compliance, negotiate with governments and when necessary to bring disputes to the judge's attention.

Consistent with a theme in this book, the declaration plus would be a domestic version of a remedial process that is routine in international law. Supra-national adjudicators do not attempt specific command and control strategies. They know that they lack the information necessary to formulate them and the contempt powers necessary to enforce them. They also routinely retain jurisdiction and ask states and parties to report back to them about their response to proven rights violations.

[169] 28 U.S.C. s.2202 (2012). For an examination of relatively rare use of this power see Bray, "The Myth of the Mild Declaratory Judgment" at 1111–1113.

[170] On the reluctance of judges to use contempt in part because of its counterproductive effects, see James M. Hirschhorn, "Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions" (1984) 82(8) *Mich. L. Rev.* 1815, 1841; Larry Yackle, *Reform and Regret: The Story of Federal Involvement in the Alabama Prison System* (New York: Oxford University Press, 1989), p.219ff (noting no evidence of any official going to jail for contempt for defying a structural injunction issued by a Federal Court); see also Nicholas Parrillo, "The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power" (2018) 131 *Harv. L. Rev.* 685.

Those who embrace a stark dualist approach that separates international and domestic law may argue that the declaration plus will reduce domestic courts to a pleader without even the threat of enforcement powers. Such criticisms, however, ignore that domestic courts already use declarations and in many cases governments try to comply with their requirements. They also discount the ability of judges who retain jurisdiction if necessary to place contempt powers back on the table if and when they are prepared to make specific orders that can fairly be enforced through contempt powers. By that time in the dispute, the judge likely will have become familiar enough with the context to make specific orders that provide fair notice. For example, judges who issue declarations plus and retain jurisdiction could, if necessary, order injunctions to prevent irreparable harm to rights during a longer-term process of systemic reform.

7.4.5 The Canadian Experience with the Declaration Plus

The Canadian courts have been struggling to recognize an intermediate remedy between a general declaration that ends the court's involvement and injunctions that must be specific enough to give fair notice for contempt.

From 1985 to 1992, the Supreme Court of Canada retained jurisdiction to ensure that Manitoba's laws were translated into French in compliance with constitutional obligations.[171] The Court encouraged the parties to establish a schedule for translation by consent. In several hearings, the Court elaborated on the extent of translation requirements in response to

[171] The Court rejected a more experimental approach urged by some of the applicants and supporting intervenors that would have declared all of Manitoba's unilingual laws to be of no force and effect. The Court reasoned that this approach was inconsistent with the judicial role because it would rely "on a future and uncertain event", namely a constitutional amendment and use of executive power to enforce the Constitution: *Reference re Manitoba Language Rights,* [1985] 1 SCR 721 at 753. This approach was experimental in that it would have likely removed political blockages caused by the Conservative opposition who had thwarted a vote on a constitutional amendment by refusing to answer the division bells. The amendment would essentially have replaced any obligation to translate old laws for contemporary guarantees of French language services from the Manitoba government. See Gordon Mackintosh, "Heading Off Bilodeau: Attempting Constitutional Amendment" (1986) 15 *Man. L. J.* 271; Kent Roach, "The Judicial, Legislative and Executive Roles in Enforcing the Constitution: Three Manitoba Stories" in Richard Albert and David Cameron (eds.) *Canada in the World* (Cambridge: Cambridge University Press, 2018), pp.280–294.

what it characterized as genuine disputes about its original 1985 ruling. In 1990, the Court extended the time necessary to translate non-statutory legal instruments.[172] There was never any threat of the Manitoba government being held in contempt, though the Court did rule in 1992 that any future unilingual instrument would immediately be held of no force and effect. This focused on preventing new harms to language rights while recognizing the need for delay to achieve the massive translation process.[173] It is possible to see this case as a declaration plus because the Court declared the required outcome and retained jurisdiction without making specific orders that could be enforced by contempt. It resolved several subsequent disputes about what the rights in question required in a transparent and fair manner that resulted in subsequent judgements. The Court in 1992 made clear that it would not tolerate new violations of minority language rights.

Although it was defended as a structural injunction, the leading Canadian case of *Doucet-Boudreau* v. *Nova Scotia*[174] also combined the generality of a declaration with the trial judge's retention of jurisdiction. The case involved a long-standing failure in Nova Scotia to provide minority language public education. The Nova Scotia case involved five different locations, multiple parties including a province-wide francophone school board and a variety of means of achieving homogenous French language education, including the construction of new schools. The trial judge made an order that, while defended as an injunction, simply required the governmental defendants to make "best efforts" to comply with rights. Such a vague and aspirational order would have been difficult to enforce by contempt. At the same time, the trial judge required the government to submit progress reports in affidavit form that would be subject to adversarial challenge by the parties. The trial judge's "best efforts" order avoided what Fuller recognized as the evil of laws that ordered the impossible. It was based more on what he defended as a morality "of aspiration".[175] It was also consistent with Bickel's defence of judicial supervision of gradual desegregation where the judicial task "was not to punish law breakers but to diminish their number".[176]

[172] *Reference re Manitoba Language Reference*, [1990] 3 SCR 1417.
[173] *Reference re Manitoba Language Reference,* [1992] 1 SCR 212 at 233.
[174] [2003] 3 SCR 3.
[175] Fuller, *The Morality of Law*, p.170.
[176] Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1986), p.251.

Nova Scotia objected to the increased accountability that came with the retention of jurisdiction. It appealed the trial judge's retention of jurisdiction on the basis that the trial judge was functus. A majority of the Court of Appeal allowed the appeal. It displayed a long-standing antipathy among some Canadian judges towards American-style public law litigation. One dissenting judge defended the trial judge's approach as a "creative blending of declaratory and injunctive relief"[177].

The Supreme Court of Canada restored the trial judge's approach in a bitterly divided 5–4 decision. Justices Iacobucci and Arbour stressed the need to respect general principles about the need for effective and responsive remedies, adherence to a flexible understanding of the separation of power and fairness towards the defendant.[178] They stressed that the trial judge's best efforts order had left "detailed choices of means largely to the executive".[179] They concluded that while the reporting order could have been more precisely worded, it was not unfair to the government. As Justice Rouleau and Linsey Sherman have commented: "retaining jurisdiction allows the court to refrain from making decisions on the basis of incomplete information and on matters in which it has little expertise".[180] It also creates space for creative solutions such as using existing English language schools for French language instruction.

The four dissenting judges argued that the trial judge had exceeded his legitimate judicial role. They disparaged the progress report hearings as "a cross between a mini-trial, an informal meeting with the judge and some kind of mediation session".[181] In some ways, this echoed Fuller's observation that a mixed form of ordering could deal with the

[177] *Nova Scotia* v. *Doucet-Boudreau,* (2001) 203 DLR (4th) 128 at para 70.

[178] The majority elaborated that an appropriate and just remedy under s.24(1) would 1. vindicate the rights of the applicant given the violation and the applicant's circumstances; 2. must not "unduly or unnecessarily" depart from the judicial role in "resolving disputes"; 3. "vindicates the right while invoking the function and powers of a court"; and 4. would be "fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right" and can include "novel and creative features" when necessary to respond to the "challenges" and "needs" of the particular case: ibid. at paras 56–59.

[179] *Doucet-Boudreau* v. *Nova Scotia,* 2003 SCC 62 at para 69.

[180] Paul Rouleau and Linsey Sherman, "Doucet-Boudreau, Dialogue and Judicial Activism" (2010) 41(2) *Ottawa L. Rev.* 171, 194.

[181] *Doucet-Boudreau* v. *Nova Scotia* at para 100. The dissenters also echoed Fuller when they stated: "[t]he judiciary is ill equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation. This Court has recognized that courts possess neither the expertise nor the resources to undertake public administration". Ibid. at para 120.

complexities of polycentric issues. The trial judge, by holding the progress hearings, had crossed "the boundary between judicial acts and administrative oversight" and in doing so had acted "illegitimately and without jurisdiction".[182] If the judge was prepared to make more orders after an unsatisfactory progress report, he was treating the government unfairly. On the other hand, if he was only attempting to induce compliance by persuasion and transparency, he was acting like a leader of the opposition by placing the government's "feet to the fire" and placing "pressure on the government to act".[183]

The minority discounted that the trial judge had, as emphasized by the majority, treated all parties fairly. The trial judge rightly resisted the temptation to resort to what Fuller rightly denounced as informal "lunch time" methods of enforcement.[184] The progress reports simply collected information that would otherwise only be known to the government. Moreover, the trial judge's fidelity to adjudication facilitated adversarial and public debate about the significance of that information. If the judge had made any additional order, that order could be appealed, as indeed the government appealed his retention of jurisdiction. The government's appeal is ironic given that Canada's experience with retention of jurisdiction suggests that the government is most often its beneficiary. For example, the government could have asked for more time or elaboration of any lack of clarity in the original declarations, just as had occurred in the *Manitoba Language Reference* and when courts extend suspended declarations of invalidity.

The dissenters in *Doucet-Boudreau* distorted what the trial judge did as a heavy-handed and politicized assumption of the executive role. This echoes much critical commentary on complex remedies but like that commentary it ignores the complexities of what was actually done. For example, the minority focused only on part of the remedy, namely retention of jurisdiction. The majority recognized that the retention of jurisdiction balanced the best efforts order that appropriately deferred to the government's expertise in organizing education and building schools. The majority concluded that the overall result was rooted in "balance and moderation",[185] not judicial usurpation.

[182] Ibid. at para 117; see also ibid. at para 112.
[183] Ibid. at paras 127–128.
[184] Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353, 389.
[185] *Doucet-Boudreau* v. *Nova Scotia,* 2003 SCC 62 at para 13.

The minority's preferred remedy, a "construction deadline with the possibility of a contempt order",[186] was in many ways more extreme than what the trial judge did. It invoked what Fuller saw as a positivistic morality of duty that assumed that legal commands had to be precisely set out to be enforceable. The minority's focus on precision and enforceability assumed that the government was a "bad man" who must be given the clearest of orders that if breached could result in a stern sanction. It would also force the trial judge to make specific orders and set deadlines in a manner that would require detailed information about educational facilities and school construction in five different parts of the province. It would have taken away flexibility that both the government and the minority needed with the school year approaching.

Although the minority accepted that courts could use coercive injunctions, it is difficult to think that many judges would be prepared to issue such precise orders at least in the first instance. Indeed, the minority's insistence on clear rules that could be enforced by contempt has acted as a type of "poison pill" that has scared Canadian judges off from retaining jurisdiction. Unfortunately, the dissenters' position has become more widely accepted in the years since.[187] The threat of contempt continues to influence the form of injunctions by generally requiring that the injunction be clear and precise.[188] This is unfortunate because judges may often not have enough information to order a detailed injunction. Even if they could obtain such information, such command and control standards may be counter-productive by encouraging the government to abide by the letter but not necessarily the spirit of the order.[189]

Both the *Manitoba Language Reference* and *Doucet-Boudreau* are best conceived of as declaration plus cases in which the court retained jurisdiction because of the complexity of complying with minority language rights and the province's delay in complying. Neither the "best efforts" order in *Doucet-Boudreau* nor the flexible translation schedules in the *Manitoba Language Reference* could fairly be enforced by contempt. They

[186] Ibid. at para 143.

[187] The Kenyan Court of Appeal has also rejected retention of jurisdiction as contrary to the idea that judges should be functus after rendering their judgements: *Kenya Airports Authority* v. *Mitu Bell Welfare Society,* [2016] eKLR, Civil Appeal No. 218 of 2014.

[188] *Thibodeau* v. *Air Canada*, 2014 SCC 67 at paras 125–127 relying on a private law precedent stressing the importance of clarity in the injunction because a contempt holding could result in a fine or incarceration.

[189] See Sabel and Simon, "Destabilization Rights", on the move away from command and control.

were essentially declarations. In subsequent decisions in the *Manitoba Language Reference*, the Court expanded on the requirements of its original declarations and resolved legitimate and genuine disputes about them. The progress reports in *Doucet-Boudreau* seemed to have worked because the case was moot by the time it reached the Supreme Court.

A declaration plus is an intermediate remedy between general and unenforceable declarations and detailed and specific injunctions enforceable by contempt. It fills an important gap in the remedial arsenal. It allows courts to focus on interpreting the general requirements of rights while allowing the state to select the means of compliance, subject to adversarial challenge by the parties.

7.5 Towards a Two-Track Approach

Since Abram Chayes' identification of the public law model of adjudication, it has been widely accepted that the aim of institutional reform litigation is to achieve reforms so as to prevent future violations. Chayes recognized the traditional nature of compensatory remedies but dismissed them as anachronistic.[190] But in doing so, he under-estimated the importance of right to a remedy reasoning for judicial legitimacy and success. He may also have under-estimated the challenges and frequent failures of systemic reforms.

Systemic reform is necessary to prevent repetitive violations caused by institutions. Nevertheless it should be joined with individual relief that addresses the wrongs done to individuals caught in the grip of institutions that consistently violate rights. In a recurring theme in this book, supra-national courts point towards a different and more balanced approach to remedies than that used by most domestic courts. Both the ECtHR and the IACtHR have taken a two-track approach to institutional reform: one that provides individual remedies for past violations while engaging with states to take actions to prevent future violations. The remedial record of these supra-national courts is not perfect. They do, however, recognize the inadequacy of approaches that focus only on individual or systemic remedies.

7.5.1 The Pathologies of Exclusively Individual Remedies

A range of individual remedies including damages and the exclusion of evidence have been examined in the last two chapters. Many of these

[190] Abram Chayes, "Foreword: Public Law Litigation and the Burger Court" (1982) 96(1) *Harv. L. Rev.* 4, 47ff; see also Fiss, "The Forms of Justice".

remedies have been directed at the police. These individual remedies have imposed considerable costs on society. Alas, they have left in place many police services that continue to violate rights.

At the starkest level, damages allow states to pay a fine (and raise taxes) for violating human rights. It is not a coincidence that states are often more willing to pay damages awarded by regional human rights courts than take measures to prevent future violations. Exclusion of evidence, stays of proceedings and release of individuals by way of habeas corpus are necessary to provide effective remedies for those whose rights are violated in the criminal process. Nevertheless, they leave in place institutions that continue to violate rights, including the rights of the disadvantaged and the unpopular. They provide little incentive for states to engage in systemic reform. Individual remedies can play a helpful role in reform, especially when they are well publicized and provide a human face to rights violations.[191] Nevertheless, a reliance on individual remedies will not bring complex bureaucratic institutions into compliance with minimal rights standards.

7.5.2 *The Pathologies of Exclusively Systemic Remedies*

Systemic remedies are necessary, but they need to be grounded by individual remedies and with that the lived experience of those whose rights have and will be violated. The California prison case, by spinning out into reducing overcrowding, lost its focus on the harms that inadequate healthcare causes to prisoners. Eventual compliance with the order that California prisons "only" be 137.5 per cent over capacity allowed California to operate a prison system well above capacity and with inadequate healthcare.

Another example of a purely systemic approach that seems to have spun out of control is *Missouri* v. *Jenkins*.[192] In that case, the United States Supreme Court authorized the creation of a magnet school and taxation scheme to fund city schools after the trial judge found that busing involving the suburbs was not permissible because the suburbs had not engaged in intentional segregation. The state complied and built a school with excellent facilities. It was known colloquially in Kansas City as the "Taj Mahal". Alas, the school was not supported by the Black

[191] Charles Epp, *Making Rights Real* (Chicago: University of Chicago Press, 1993).
[192] 495 US 33 (1990). The Court did indicate that the trial judge erred by raising taxes but rather should have required the elected authorities to do so.

community. It largely failed to achieve either integration or improved academic performance.[193] In 1995, the case returned to the Supreme Court, which tried to encourage an end to the failed US$500 million experiment. It ruled that the Court could not increase teacher salaries in pursuit of the desegregation plan.[194] The failure of this well-intentioned remedy combined with reservations that Derrick Bell and others have expressed about busing remedies reveals that purely systemic approaches are likely to fail and can have counter-productive effects. This is particularly so if the intended beneficiaries of the remedy do not participate in helping to formulate the remedy.[195]

William Simon and his colleagues have recently argued in favour of a purely systemic approach to both bankruptcy and public law litigation on the basis that individual claims may divert limited resources.[196] This ignores, however, that public funds in the human rights context are not as limited as the funds of a bankrupt corporation. It also ignores that damage awards for human rights violations are often modest. There is also a role for non-monetary alternative individual remedies, such as apologies and court orders that relate to specific litigants. More fundamentally, it ignores how individual remedies can enhance the legitimacy of the court and provide some success and marker of past injustices as the court continues to struggle to achieve reforms that will minimize future violations.

Courts faced with dire systemic problems may be tempted to focus on them exclusively. The Indian courts have frequently taken a purely systemic approach. In the next chapter, it will be acknowledged that the Indian courts have had some success with this approach in the right to food litigation. Nevertheless, in many other cases they have imposed harms on litigants by, for example, authorizing evictions and slum demolitions.[197]

As discussed in Section 7.2.4, an ongoing Indian prison case initiated by a complaint from a former Chief Justice has generally focused on

[193] Joshua Dunn, *Complex Justice: The Case of Missouri* v. *Jenkins* (Chapel Hill: University of North Carolina Press, 2008), p.1.

[194] *Missouri* v. *Jenkins II*, 515 US 70 (1995).

[195] Dunn details how the Black community was ambivalent or even hostile to the remedy: Dunn, *Complex Justice*. For other findings that the interests of institutions and lawyers have often been advanced in public interest litigation over those of intended beneficiaries, see Sandler and Schoenbrod, *Democracy by Decree*.

[196] Noonan, Lipson and Simon, "Reforming Institutions", 503–506.

[197] Bhuwania, *Courting the People*, p.86.

systemic remedies. More recently, however, it has started to address the distinctive needs of sub-groups of prisoners such as women and youth. The Court has also mandated local courts to investigate and, if appropriate, award damages with respect to over 500 "unnatural" deaths that occurred in India's prisons between 2012 and 2015.[198] This move demonstrates more concern for unnecessary deaths in prison than is seen in the California prison case. It also follows a pattern in the right to food litigation where the Court focused on the needs of sub-groups and also used documented starvation deaths as evidence of non-compliance.[199] By focusing on specific vulnerable groups and specific violations of rights such as prison and starvation deaths, the Indian Supreme Court has started to move towards a two-track approach that combines individual and systemic remedies.

In an attempt to manage its crushing caseload, the ECtHR has adopted a pilot judgement procedure that allows the Court to suspend pending claims while a systemic remedy is developed by the state in consultation with the Committee of Ministers. In its focus on systemic justice, this approach departs from the two-track approach and has been criticized for sacrificing individual justice.[200] The Court has recently expanded this approach by delegating over 12,000 individual claims against the Ukraine to the Committee of Ministers. Seven judges in the Grand Chamber issued a strong dissent. They argued that individual claims and access to the Court was being sacrificed for the sake of efficiency.[201] At the same time, even this approach is not as unbalanced as the California prison case. In order to comply with the right to an effective remedy, European states will often have to provide both individual and preventive remedies, including in the cases that were suspended pending a pilot judgement.

[198] Supreme Court of India, Writ Petition (Civil) No. 406 of 2013, *In Re Inhuman Prison – 1382 Prisons* (15 September 2017), online (pdf): www.slsagoa.nic.in/Report%20WP%20No.406%20of%202013.pdf

[199] *People's Union for Civil Liberties* v. *Union of India & Ors*, Writ Petition (Civil) No. 196 of 2001, Court Order of 3 May 2003, online: www.escr-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original See *infra* Chapter 8, Section 8.6.3, for discussion.

[200] Antoine Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges" (2009) 57 *Nomiko Vima* 1890, 1902; Janneke H. Gerards and Lize R. Glas, "Access to Justice in the European Convention on Human Rights System" (2017) 35 *Netherlands Q. Hum. Rts.* 11, 27; Eline Kindt, "Giving up on Individual Justice?" (2018) 36 *Netherlands Q. Hum. Rts.* 173.

[201] *Burmych and Others* v. *Ukraine* [GC], No. 46852/13 et al., ECHR 12 October 2017.

Systemic cases are ultimately about respect for the rights of individuals and groups. Harms to individuals both before and during the court's retention of jurisdiction should be taken seriously. Practically, attention to distinct harms and the award of individual remedies in a large systemic case may also produce some remedial success for the Court and also focus public attention on the consequences to individuals of systemic injustices.

7.5.3 Examples of the Two-Track Approach

As outlined in Chapter 2, Section 2.4, the two-track approach is both a descriptive account of what courts at their best can do and a normative account of what they should do.

7.5.3.1 Supra-national Adjudication

The Council of Europe system increasingly takes a two-track approach to complex cases under Article 46 of the European Convention. At times, the ECtHR has made some indications of the general or systemic measures that it concludes are necessary to prevent future violations. Professor Mowbry's thorough review of these indications, however, reveal them as quite general and declaratory in nature.[202] They are a far cry from the detailed orders associated with injunctions issued by domestic courts. They are better seen as a declaration plus remedy.

The Committee of Ministers has attempted to be more transparent about its interactions with states during the execution of judgements. In many, but not all cases, it issues public reports. It has an institutional incentive to end supervision, even in cases where there is less than full compliance. For example, it has ended its supervision of the UK's refusal to allow voting in prisons and of prison condition cases in Russia and Italy. The two-track approach should be attentive to the risk of remedial failure and backsliding if prisoners bring new cases where they can establish that their rights have been violated.

The IACtHR also follows a two-track approach. Unfortunately states have a tendency to comply with individual remedies such as damages more than with systemic remedies. Fortunately the IACtHR undertakes

[202] For a detailed discussion of the ECtHR practice in this regard and examples of what the Court says about general measures, see Alistair Mowbry, "An Examination of the European Court of Human Rights Indication of General Measures" (2017) 17 *Hum. Rts. L. Rev.* 451.

its own monitoring of its judgements, often for years after the original decision. Aided by the assistance of the Inter-American Human Rights Commission, the applicants and other interested parties, the IACtHR should be more specific in the face of non-implementation of systemic orders.[203] Such an escalation of response should not violate either the separation of powers or subsidiarity because it would be based on the state's failure to comply with the Court's remedy and to take reasonable steps to prevent violations.

7.5.3.2 Domestic Courts

As Derrick Bell's work suggests, a two-track approach to school desegregation might have involved remedies designed to improve educational equity while more gradual systemic remedies achieved greater integration.[204] In some cases, it may have followed the *Cooper*[205] approach of combining immediate remedies to allow named plaintiffs to attend previously segregated schools with broader systemic remedies such as a schedules for desegregation. This was an approach taken by Justice Brennan in an original draft of the *Cooper* v. *Aaron* decision, but the more ambitious two-track approach was dropped in order to maintain the unanimity of the Court.[206]

A two-track approach in prison cases would order immediate remedies in relation to healthcare and harmful practices while more gradually pursuing long-term systemic goals including better healthcare facilities in prison, more healthcare staff and the reduction of overcrowding. Longer-term systemic remedies also can create space and time for meaningful participation by a range of actors, including those who are supposed to benefit from the remedy. Systemic remedies should include participatory rights for those that the remedy is supposed to benefit, through allowing submissions and adversarial challenge to the government's remedial plans or requiring the government to consult with those affected before implementing a declaration. These participatory

[203] This is not to say that general orders in the first instance may not be of value in part because they create space for the state and the parties to focus on evolving priorities. On specificity see Rachel Murray and Clara Sandoval "Balancing Specificity of Reparation Measures and State's Discretion to Enhance Implementation" (2020) 12 *J of HR Prac.* 101.

[204] Bell, *Silent Covenants*, pp.20–29.

[205] 358 US 1 (1958).

[206] Michael Klarman, *Brown* v. *Board of Education and the Civil Rights Movement* (New York: Oxford University, 2007) at p.108.

mechanisms can respond to the danger that institutional litigants, amicus curiae and masters may not always represent the priorities and immediate interests of those who have suffered a rights violation.[207]

7.5.3.2.1 South Africa As will be discussed in Chapter 8, Section 8.6.10, the South African courts are increasingly taking a two-track approach that provides individual remedies against eviction (or temporary accommodation) with longer term systemic remedies to construct public housing. The declaration plus approach described in Section 7.4 of this chapter might strengthen the South African approach by requiring courts in general terms to provide a sense of what housing rights require rather than relying on open ended engagement orders as systemic remedies.[208]

One South African case focused on seven mud schools in some of the poorest areas of the country. Mobile classrooms with water supply, desks and chairs were provided pending the construction of permanent schools. By 2013, the construction of new schools for the original seven schools was almost complete. More systemically, 200 temporary classrooms were provided to mud schools and construction was started on ninety schools.[209] The success of this case is consistent with the two-track approach because it focused first on achieving remedies for the seven schools before expanding to other schools. Other litigation started with the appointment and payment of 140 teachers to unfulfilled vacancies. It has subsequently expanded to include teachers from ninety more schools.[210] Gilbert Marcus and Steven Budlender, in their important reports on South African public law litigation, have stressed the

[207] Bell, "Serving Two Masters".

[208] Sue-Mari Viljoen and Saul Porsche Makama, "Structural relief – A Context-Sensitive Approach" (2018) 34 *S.A J. Hum. Rts.* 209, 210, 229. For an argument that the relief ordered by the trial judge in the famous Grootboom housing rights was essentially a declaration plus, see Roach and Budlender, "Mandatory Relief and Supervisory Jurisdiction", 329.

[209] The applicant Legal Resource Action Centre did start new litigation in 2014 but aimed at requiring the school authorities to disclose plans and progress. The follow-on litigation may have been unnecessary had the court retained jurisdiction: Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014), p.81 online (pdf): www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf

[210] Ibid., pp.88–99.

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importance of starting with narrowly framed cases and then building on their success.[211]

7.5.3.2.2 Colombia The Colombian Constitutional Court has also combined individual and systemic relief. In a 2004 case, it aggregated 108 individual tutela applications that requested a range of remedies relating to the health, housing and education rights of over 1,000 persons displaced by internal conflict. The Court recognized that the individual violations had "structural" causes. They involved "a social problem whose solution requires the intervention of various entities", additional budget and a "coordinated set of actions".[212] As with supra-national courts,[213] concerns about courts being overwhelmed with individual actions was one of the repeated factors that the Court cited in declaring an unconstitutional state of affairs and taking a more systemic or structural approach.

The Court ordered a wide variety of individual remedies and imposed deadlines on the state of eight to fifteen days for those relating to health and housing and thirty days for those related to education.[214] Some may criticize such individual remedies as "queue jumping".[215] Nevertheless, they honoured the purposes of tutelas or amaparos in providing individual remedies akin to habeas corpus in common law countries. These individual remedies were dominated by the court.

The Court's systemic remedies were more tentative and dialogic. The Court struck a modest tone noting that "[t]he *tutela* judge cannot solve each one of these problems, which corresponds to both the National Government and territorial entities, and to Congress, within their respective margins of jurisdiction".[216] These systemic remedies should be designed "to protect, based on the principle of equality, the rights of those found in a similar situation to the petitioner, but who have not filed tutelas".[217]The Court made clear that systemic remedies would require

[211] Ibid.
[212] Decision T-025 of 2004, translated in Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law* (New York: Oxford University Press 2017), p.182.
[213] Gerald L. Neuman, "Bi-Level Remedies for Human Rights Violations" (2014) 55 *Harv. J. Int'l. L.* 2.
[214] Decision T-025 of 2004 at paras 11–14 in Espinosa and Landau, *Colombian Constitutional Law*.
[215] This critique will be discussed in Chapter 8, Section 8.6.8.
[216] Ibid. at para 6.3.1.4.
[217] Ibid., p.182.

budgetary increases, but did not order them but rather called on the government to propose a budget. This has been identified as a factor in getting the government's attention and substantially increasing dedicated budgets.[218]

Like supra-national courts, the Colombian Court took a whole of government approach that required various ministries to respond to its judgement.[219] The systemic orders were designed both to minimize future violations and to reduce the caseload of the courts. The Court specifically ordered that the authorities should not make the filing of a tutela a precondition for recognizing the rights of displaced persons. This builds on an alignment between the institutional interests of the courts and the more principled interest in preventing future and repeated violations. Relative ease of action in filing tutelas meant that the Colombian courts were, like supra-national courts, moved to seek systemic remedies in part because of concerns about conserving scarce judicial resources.

The Colombian Court tried to empower internally displaced person in a way that could allow them to obtain benefits from the state without judicial enforcement. To this end, it ordered that displaced persons should be informed "in an immediate, clear, and precise manner about the rights that purport to secure them dignified treatment by the authorities, and to verify that this actually happens".[220] Such a clear articulation of rights, even as a matter of aspiration, has the potential to inspire a democratic process in which citizens are mobilized to demand that they be treated in a humane and dignified manner by their government. It also fits with a declaration plus model where courts focus

[218] Cesar Rodriguez-Garavito and Diana Rodriguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socio-economic Rights* (Cambridge: Cambridge University Press, 2015), p.74: "T25's immediate effect was to shake up state bureaucracies responsible for attending to the IDP population. The Constitutional Court used socioeconomic rights as "destabilization rights", which were designed to provide the pressure needed for breaking the deadlock surrounding assistance to the displaced population. Such deadlock resulted from dispersion of responsibilities, poor coordination between the agencies in charge assisting IDPs, deficient budget, and sluggishness on the part of state entities".

[219] Huneeus identifies the whole of government approach taken by international court as a disadvantage, but it may be an advantage in some contexts: "Reforming the State from Afar".

[220] Decision T-025 of 2004 at para 10.1.4 in Espinosa and Landau, *Colombian Constitutional Law*.

on interpreting rights while leaving the implementation of rights to others.

As Cesar Rodriguez-Garavito and Diana Rodriguez-Franco argue, the systemic orders were not prescriptive. They involved an extensive articulation of the rights at stake and a strong commitment to monitoring. The Court should promote reform without deciding the precise means to achieve reform or the precise content of reform.[221] Nevertheless, the systemic remedies ordered did become more specific and prescriptive over time. A 2008 decision focused on the rights of women. It "ordered the creation of 13 programs to meet specific gaps in public policy toward displaced women and girls of all ages".[222] A 2009 decision focused on the rights of Indigenous peoples. It required "the adoption of thirty-four ethnic safeguarding plans, one for each of the indigenous peoples at risk of disappearing". It was "supplemented by three follow-up decisions, ordering urgent measures to protect specific groups within the indigenous population that are under greater risk".[223]Another 2009 order requiring five pilot projects for displaced persons with disabilities.[224]

7.5.3.2.3 India Indian courts have followed a similar pattern in both their right to food and prison cases in focusing on distinct needs of subgroups of those who are supposed to benefit from the systemic remedies. The Indian Supreme Court has also taken a two-track approach in a case where it ordered damages, the construction of housing and police patrols for an individual victim of sexual violence. At the same time, the Court implored "the State machinery to work in harmony" to prevent sexual violence and also indicated that public and private hospitals should provide free treatment and rehabilitation for all victims of sexual violence.[225] Courts in the west have much to learn from the remedial practices of these courts in the global South, which combine generous and creative individual remedies with a variety of systemic remedies.

[221] Rodriguez-Garavito and Rodriguez-Franco, *Radical Deprivation on Trial*, p.19 discussing Colombia Constitutional Court, ch.4.
[222] Constitutional Court, Decision 92 of 2008.
[223] Rodriguez-Garavito and Rodriguez-Franco, *Radical Deprivation on Trial*, p.47; Colombia Constitutional Court, Decision 6 of 2009 at para 47; Colombia Constitutional Court, Decision 382 of 2010; Colombia Constitutional Court, Decision 174 of 2011; Colombia Constitutional Court, Decision 173 of 2012.
[224] Rodriguez-Garavito and Rodriguez-Franco, *Radical Deprivation on Trial*, p.90.
[225] Re Woman gang-raped, (2014) 4 SCC 786 at paras 23–26.

7.5.4 *Stopping Irreparable Harm during Systemic Reform*

The order of urgent measures during the systemic phase of public law litigation also demonstrates the mutually re-enforcing nature of the two-track approach. Such orders should be patterned on interim remedies designed to prevent irreparable harm. Like interim remedies, they should be changed if the evidence warrants it. The IACtHR has even ordered such provisional measures after the final judgement on the merits.[226]

Individual remedies to stop irreparable harm could have ensured that prisoners in the California prison case received required medical treatment. It could have reminded the court of both continued right violations but also the priorities of the rights holders. Individual remedies can inject concerns about substantive rights into a remedial process that over time may have become technocratic and focused on procedure and the interests of small "working groups" of experts and lawyers[227] or the judge's own interests.

7.5.5 *Remedial Failure and Remedial Cycles*

Systemic reform is difficult to achieve. For this reason, it is important that courts retain jurisdiction. The two-track approach is responsive to the reality of remedial failure by providing that judges should be open to ordering new individual remedies and to re-considering their systemic remedies in light of new evidence. A continued willingness to order individual remedies respects the integrity of adjudication as related to claims of wrongs and entitlement to remedies by specific individuals.[228] It integrates traditional right to a remedy reasoning that was unwisely abandoned in early articulations of public law litigation.

Early defenders of public law litigation such as Chayes and Fiss disparaged individual remedies as archaic to the modern age. They were correct that we needed systemic remedies and that courts could use some assistance from others. They were wrong, however, that individual remedies should be abandoned. Individuals caught in institutions that continually violate their rights need remedies. Courts also need to issue such

[226] Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (Antwerp: Intersentia, 2010) p.171 documenting fifteen such cases.
[227] Sandler and Schoenbrod, *Democracy by Decree*.
[228] Fuller, "The Forms and Limits of Adjudication".

remedies to confirm their legitimacy as courts and to achieve some remedial success.

Continued requests for individual and interim remedies should alert judges to problem areas. It may continue their education about the particular institution. It may also persuade them in cases where the state is unwilling or unable to prevent continued violations to take a more prescriptive approach. The declaration plus provides the procedural vehicle that allows the court to start with general declarations but if necessary move towards injunctive relief.

7.6 Conclusion

Domestic judges are often reluctant to retain jurisdiction as a means to reform complex public institutions that chronically violate rights. Judges remain much more comfortable with "one shot" individual remedies, such as damages and the exclusion of evidence discussed in the last two chapters. This is so even when the human rights violations in those cases are a product of the failure of public institutions.

Judges are haunted by doubts that they are ill-equipped to deal with polycentric or multi-faceted problems because they only hear one case at a time. To be sure, they should be cautious when confronting polycentric problems, but the idea that they should not or cannot consider such problems should be rejected. It would suggest that courts should rarely pursue systemic remedies designed to prevent future violations. It would also suggest that judges are not suited to enforce social and economic rights and Indigenous rights, to be examined in the next two chapters.

One way to deal with polycentric complexities is for courts to retain jurisdiction and to be open to hearing new evidence about problems that both governments and plaintiffs are encountering during complex processes of systemic reform. Domestic courts should be more willing to retain jurisdiction and adjust their approach when warranted by the production of new evidence. If under-resourced supra-national courts like the IACtHR can monitor compliance, better resourced domestic courts in democracies should be able to do so too.

Domestic courts may need a new remedy to encourage them to retain jurisdiction. They associate retention of jurisdiction with the need to put the government on notice that the court is prepared to use punitive contempt powers. This requires domestic courts to use specific command and control orders. Judges usually do not have the necessary information to formulate such standards at an early point in the remedial process.

Even if they do, such specificity could be counter-productive by insisting on rules that will often be over or under inclusive.

Judicial acceptance of the declaration plus would allow judges to issue declarations that define and declare the scope of rights and the general obligations that they place on governments. It will relieve them of the burden of having to specify in detail, at the early stage of a complex remedial process, the means and deadlines for compliance. Supra-national courts do not live with the due process burdens of contempt powers. The processes that they follow essentially involve the declaration plus advocated for in Section 7.4. In other words, they cannot coerce, but they can and often do retain jurisdiction.

Both the ECtHR and IACtHR have recognized the importance of providing both individual and systemic remedies even in complex institutional cases. Some domestic courts in Colombia, South Africa and more recently India have on occasion followed this path, but all domestic courts need to do so more routinely and self-consciously. Individual remedies provide some remedial success and bolster judicial legitimacy. They counter the tendency seen in American public law litigation to ignore the need to repair or prevent discrete harms caused to individuals. They may also help counter the drift in such cases to systemic remedies that do not always seem to serve the interests of those they are intended to benefit.

A two-track remedial strategy accepts the traditional role of courts in providing individual remedies while recognizing that individual remedies in the modern state are often not sufficient to ensure compliance with human rights. The two-track approach allows courts to respond to the harms that non-compliance imposes on real people. Individual remedies can also make it easier to take the time that is necessary to allow participation in the formulation of systemic remedies and hopefully to get it right. They may also allow courts to avoid the "reformer at large" tendency seen in some American and Indian public law cases. In short, a two-track remedial approach can preserve the integrity of adjudication while recognizing the challenges that courts will confront in dealing with polycentric problems.