

Constitutional Remedies in India: The Need for Dialogic and Two-Track Approaches

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Abstract

The Indian courts have embraced what Abram Chayes characterised as forward-focused public law litigation with an emphasis on the continuing mandamus or structural injunction remedy. Public law litigation can be justified given both access to justice concerns and the bureaucratic nature of the modern state. Nevertheless, the remedial performance of Indian courts could be improved by greater use of a more dialogic and two-track approaches where courts attempt to simulate executive and legislative responses and order both individual and systemic remedies. Dialogic remedies recognise that courts can prompt rather than usurp executive and legislative functions. Individual remedies, such as damages and release orders, capitalise on judicial strengths and the long-recognised principle that where a right has been violated, there should be a remedy. An example of a two-track approach would be to combine the continuing mandamus in ongoing prison reform litigation with the award of damages and release remedies. Under a two-track approach, courts could dialogically and initially defer to the superior abilities of the executive and legislatures with respect to systemic remedies. Individual remedies could provide a measure of remedial success while also serving as a means to recognise the frequent failure of systemic reforms to prevent all future violations and the need for iterative cycles of intensifying two-track remedies designed to provide both individual and systemic remedies. As in the United States, Indian public law litigation aimed at

vindicating human rights is vulnerable to populist and authoritarian backlashes against unpopular and less powerful groups. Public law litigation for human rights violations should be retained, but improved and strengthened by more dialogic and two-track approaches that combine individual and systemic remedies.

Introduction

Debates about constitutional remedies have been dominated by the important work of Abram Chayes who, in a landmark 1976 article in the *Harvard Law Review*, set out competing and contrasting models of traditional and public law litigation. Chayes defined public law litigation as based on grievances about public policy rather than disputes ‘between private individuals about private rights.’ The remedy was forward-looking relief and based on ‘predictive’ facts as opposed to relying on damages for past wrongs determined by ‘historical and adjudicative’ facts. The remedy in public law litigation would continue and evolve as the courts retained jurisdiction.¹

The courts of India enthusiastically embraced public law litigation in the late 1970’s and continue to embrace some forms of public law even while enthusiasm for it has waned in the United States. South African

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¹ Abram Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 Harv L Rev 1281, 1302.

and Canadian courts have been more cautious than Indian courts in their use of continuing mandamus with retention of jurisdiction.² This article will not attempt to provide a comprehensive account of Indian public law litigation as it has evolved over a number of stages.³ Rather, it will focus on remedies available in public law litigation designed to vindicate human rights with particular attention to litigation over prison conditions. It will focus on what Prof. Ashok Kumar Rai classifies as ‘relief’ in the sense of the specific outcome or benefit granted by the court to the affected party, such as compensation, injunction, or restitution. While a remedy is the legal course of action, relief is the result obtained from that action.”⁴

In extra-judicial writing in 1985, Justice Bhagwati argued that traditional backward-looking remedies would not relieve ‘the suffering of the disadvantaged’ who experienced ‘continuous repression and

² Courts in both South Africa and Canada have accepted the legitimacy of the continuing mandamus, though they have been more cautious in its use than Indian courts. *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC); *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62; see generally Kent Roach and Geoff Budlender, ‘Mandatory Relief: When is it Appropriate, Just and Equitable?’ (2005) 122 *SALJ* 325

³ Writing in 2009, Professor Surya Deva outlined an initial period starting in the late 1970s that was focused on ‘the rights of prisoners, pavement dwellers, child/bonded labourers and women’ and a second phase dealing with ‘issues such as environment, AIDS, corruption and good governance’. She expressed worries about a third phase where the focus seemed to be more on private interests in ‘development and free-market considerations’. In a 2010 case, the Indian Supreme Court generally endorsed this categorisation. It warned about the abuse of some public interest litigation including by groups who are not disadvantaged. Surya Deva, ‘Public Interest Litigation in India: A Critical Review’ (2009) 28 *Civ Just Q* 19, 29; *State of Uttaranchal v Balwant Singh Chauhal* AIR 2010 SC 2550, 2010 AIR SCW 1029 [45].

⁴ Ashok Kumar Rai, ‘Constitutional Remedies and Judicial Relief’ (2025) 2(4) *The Infinite* 2; see also Shyam Divan, ‘Public Interest Litigation’ in Sujit Choudhry and others (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

denial of rights'. He noted that the Indian Supreme Court was exploring 'new remedies which would ensure distributive justice to the deprived sections of the community.'⁵

The results of Indian public law litigation have become increasingly controversial and contested. A number of commentators have argued that various famous Indian housing rights cases have contrastingly resulted in the demolition of inadequate housing.⁶ Some have criticized Indian courts for usurping the role of both the executive and the legislature.⁷ There are also concerns that Indian courts have appointed *amicus curiae* who sometimes seem to have more interest in prolonging litigation than in developing meaningful and effective remedies for the disadvantaged.⁸ The editors of the 2016 *Oxford Handbook of the Indian*

⁵ PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 Colum J Transnat'l L 561. In his judicial capacity, Justice Bhagwati affirmed that courts may under Article 32 of the Indian Constitution give 'whatever direction, order or writ may be appropriate in a given case for the enforcement of a fundamental right'. *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161, AIR 1984 SC 802, 813. Despite Justice Bhagwati's comments about the limits of the focus on the traditional writs of habeas corpus, mandamus, certiorari, prohibition, and quo warranto, discussion of the writs continues to dominate scholarship on constitutional remedies.

⁶ Upendra Baxi, 'Law, Politics and Constitutional Hegemony' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016); Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017) 85–87.

⁷ Rehan Abeyratne and Didon Misri, 'Separation of Powers and the Potential of Constitutional Dialogue in India' (2018) 5(2) JICL 352, 378–79.

⁸ Anuj Bhuwania has stressed in much public interest litigation 'the petitioner was either irrelevant, had been excised or never existed at all'. Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017) 8. On attempts to deal with abuses of public interest litigation see Soumya Pawaiya and Niveshi Jain, 'Public Interest Litigation: Misuse and Impact of Judicial Intervention on Governance' (2018) 3 *Supremo Amicus* (January).

Constitution have concluded that ‘the grandiosity of constitutional doctrine is not matched by the strength of remedies.’⁹

This article will argue that the answer to these concerns is not to abandon public law litigation (to vindicate human rights). Rather Indian courts might improve public law litigation by pursuing a more dialogic and two-track approach to constitutional remedies. A dialogic approach¹⁰ would recognise that much public law litigation is a response to executive and legislative inertia, and that litigation can help prompt executive and legislative action. Constitutional litigation over sexual harassment and the right to food have prompted the Indian government to enact national legislation on these matters. A two-track approach¹¹ would encourage courts to order remedies for individual violations and to prevent irreparable harm to individuals while also pursuing longer term systemic remedies. Systemic remedies would be devised dialogically to interact with the legislative and executive branches of governments and civil society.

A good example of the two-track approach is found in South African Constitutional Court decisions which prohibited the eviction of a specific group of illegal occupiers of land as an individual and interim remedy, while also requiring the state to engage with the applicants to

⁹ Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, ‘Locating Indian Constitutionalism’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 9.

¹⁰ Kent Roach, ‘Dialogic Remedies’ (2019) 17 *Int J Const L* 860.

¹¹ See Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021).

develop adequate housing.¹² The South African Constitutional Court has also elaborated that top down orders from governments will not be an adequate form of engagement with the disadvantaged who are meant to benefit from the systemic remedy.¹³ A two-track approach can guard against public law litigation not providing effective and meaningful remedies for the disadvantaged who are directly affected. It can keep public law litigation from becoming detached and unanchored to specific acts of injustice that violate constitutional rights.

The two-track approach differs from the public law model, as articulated by Prof. Chayes, in including individual remedies which are designed to play to judicial strengths and fulfil traditional principles that require remedies for proven rights violations. It rejects the dichotomy that Chayes drew between individual and systemic remedies for analytical purposes. In other words, it encourages courts to order both individual and systemic remedies.

¹² Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; Occupiers of 51 Olivia Road v City of Johannesburg [2008] ZACC 14. The trial judge Dennis Davis in the famous Grootboom housing right case took a two-track approach because he maintained in force an interim injunction against the eviction of the plaintiffs while requiring the parties to submit plans for systemic relief that would include latrines and water supply. Grootboom v Oostenberg Municipality 2000 (3) BCLR 277, 294–95. On appeal, the Constitutional Court entered mainly systemic and declaratory relief and the lead plaintiff Irene Grootboom died without a permanent home. I have argued elsewhere about the dangers of remedies that neglect either individual or systemic tracks for relief: see Roach (n 11) chs 8.2.5, 8.6.2.

¹³ Schubert Park Resident Association v City of Tshwane [2012] ZACC 26.

The dialogic approach is less court centred than Chayes' model of public law litigation. It recognises the weaknesses of top-down judicial attempts to impose solutions on complex polycentric problems and the need for both governmental and civil society involvement and engagement to devise effective systemic remedies. The dialogic approach should not, however, be confused with judicial abdication or even judicial deference to manifestly inadequate executive or legislative remedies.¹⁴ When combined with the two-track approach, it can include judicial willingness to recognise and remedy individual constitutional violations with escalating systemic remedies, provided legislatures or the executive be unwilling or unable to respond with reasonably effective remedies.

Finally, the two-track model also recognises the frequent reality of remedial failure in the form of recurring human rights violations.¹⁵ The response to remedial failure should not be to surrender or abandon public law litigation. Rather it ought to be engaging in another cycle of litigation that will feature more robust individual remedies for

¹⁴ Dialogic understandings of judicial review have a long history that situates the work of the courts in the context of the role and responses of legislatures and the executive, starting with the work of Alexander Bickel. See Guido Calabresi, 'Anti-Discrimination and Constitutional Accountability: What the Bork Brennan Debate Ignores' (1991) 105 Harv L Rev 80; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2nd edn, Irwin Law 2016); Kent Roach, 'Dialogue and the Dangers of Simplified Comparative Law and Populism' in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon (eds), *Constitutional Dialogue: Rights, Democracy and Institutions* (CUP 2019). For other approaches to dialogue that may contemplate a more deferential judicial role see Rosalind Dixon, *Responsive Judicial Review* (OUP 2023); Aileen Kavanagh, *The Collaborative Constitution* (CUP 2024).

¹⁵ On the pervasiveness of remedial failures and arguments that scholars, lawyers and activists ignore remedial failure at their peril and should be prepared to take a reiterative approach see Roach (n 11) ch 2.7

recurring violations and request more intense judicial supervision of systemic remedies. These systemic remedies must be optimally delivered after executive and legislative action, taken after consultation and engagement with the disadvantaged who are the intended beneficiaries of the systemic remedies.

The American Retreat from Public Law Litigation that Should not be Followed

The American experience influenced India's initial embrace of public law litigation in the late 1970's and early 1980's. This raises the question of whether India should follow the recent American retreat from such litigation. It will be suggested that the recent American approach is unfortunate and exceptional. Moreover, it should not be emulated in India.

The American retreat has been driven by judicial and legislative developments, and by a new generation of academic commentary.¹⁶ In 1996, the American Congress restricted prison reform litigation by requiring that any prisoner release remedy must be ordered by a three judge panel of Federal Court judges, and that any relief must be 'narrowly drawn' and extend 'no further than necessary to correct the

¹⁶ Even supporters of American public law litigation now call for a more nuanced approach than judge-dominated command and control theories often associated with Owen Fiss, *The Civil Rights Injunction* (Indiana UP 1978). See for example: Charles Sabel and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harv L Rev* 1016; Margo Schlanger, 'Beyond the Hero Judge: Institutional Reform Litigation as Litigation' (1999) 97 *Mich L Rev* 6.

violation of the Federal right'.¹⁷ John Yoo, who assisted in the passage of this legislation, acknowledged that:

*A critic might argue that Congress has no authority to interfere further with the courts' remedial powers, but this position ignores Congress' plenary powers over the federal courts. Congress possesses the power to establish and regulate the lower courts, which gives it the discretion to determine the structure and powers of Article III tribunals. Congress also has the authority to determine the jurisdiction of the federal courts and the authority to define federal causes of action, which implies that Congress also has the sole right to decide how those causes of action will be enforced. Instead of being feared, congressional involvement in constitutional remedies should be welcomed.*¹⁸

Yoo's comments obliterate the anti-majoritarian role of the independent judiciary and are not applicable in constitutional democracies such as India, Canada and South Africa, all of which have constitutional guarantees of the ability of independent courts to order constitutional remedies.

Yoo's argument that 'the Constitution, especially the Tenth Amendment, recognises that the federal government and the federal

¹⁷ 18 USC § 3626; 28 USC § 1346. See Ricardo Solano, 'Is Congress Handcuffing Our Courts?' (1996) 28 Seton Hall L J 1346; Derek Borchart, 'The Iron Curtain Redrawn Between Prisoners and the Constitution' (2012) 43 Colum Hum Rts L Rev 469.

¹⁸ John Choon Yoo, 'Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts' (1996) 84 Cal L Rev 1121, 1175–76.

judiciary cannot intrude into certain core functions of the states'¹⁹ would seem to apply against remedies to enforce all constitutional rights including *Brown v. Board of Education*.²⁰ He also argued for the primacy of legislative and especially executive enforcement of the Constitution and the need for 'democratically-accountable decision-making to govern constitutional remedies'.²¹ This ignored, or perhaps accepted, the difficulties that the disadvantaged and the unpopular will have in obtaining remedies from such majoritarian institutions.²² On this view, it was President Eisenhower's decision to mobilise federal troops, and not the Court's decision in *Cooper v. Aaron*²³, that was critical to the enforcement of desegregation. Yoo candidly recognised that President Andrew Jackson's refusal to enforce the rights of Indigenous people could 'leave constitutional rights unvindicated'.²⁴ Fortunately, the legislative and majoritarian restrictions on constitutional remedies that Yoo has successfully advocated in the United States would, if imposed in India, violate Articles 32 and 226 of the Indian Constitution which guarantee the ability of courts to fashion constitutional remedies and have been recognised as 'the heart and soul' of the Indian Constitution.²⁵

¹⁹ *ibid* 1150.

²⁰ *Brown v Board of Education* 347 US 483 (1954).

²¹ Yoo (n 18) 1170.

²² On the anti-majoritarian role of courts see Alexander Bickel, *The Least Dangerous Branch* (Yale UP 1986); John Hart Ely, *Democracy and Distrust* (Harvard UP 1980); Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2nd edn, Irwin Law 2016).

²³ *Cooper v Aaron* 358 US 1 (1958).

²⁴ Yoo (n 18) 1171.

²⁵ Itka Sharma, 'Right to Constitutional Remedies: The Heart and Soul of Constitution'

The American retreat from public law litigation has come not only from legislative restrictions but also from its increasingly conservative judiciary. Unlike the Indian judiciary, it has imposed very restrictive personal standing requirements that have frequently prevented even those who have suffered constitutional violations from seeking injunctive relief.²⁶ At the same time, American courts have often shut down even the more limited individual remedies of damages through broad qualified immunity doctrines and in the national security context through broad state secrets doctrines.²⁷ The result has been what Prof. Aziz Huq has aptly characterised as ‘the collapse of constitutional remedies’.²⁸

American courts have also insisted on proof of a tight causal connection between any constitutional violation and any judicial remedy. This effectively prevented school desegregation as the Court confined any remedy to inner cities. Yoo has defended this result arguing that the Federal Courts were restricted by federalism and separation of powers requirements. Even without such restrictions, Yoo argued that judicial remedies would fail in the school desegregation context to ‘reverse white flight’ from cities or ‘improve

(2021) 4(3) *Int J L Mgmt & Hum Rts* 2478; Ayush Kumar Agarwal, ‘Article 32: The Soul and Heart of the Constitution’ (2022) 2(3) *Jus Corpus LJ* 617, quoting BR Ambedkar, one of the drafters of the Indian Constitution.

²⁶ *Los Angeles v Lyons* 461 US 95 (1983); *Lewis v Casey* 518 US 804 (1996).

²⁷ Kent Roach, ‘Substitute Justice? Indirect Challenges to American Counter-Terrorism Activities in non-American Courts’ (2012) 82 *Miss L J* 4.

²⁸ Aziz Huq, *The Collapse of Constitutional Remedies* (OUP 2021).

African-American academic achievement’ because they do not have power over ‘economic imperatives’.²⁹ He also asserted that ‘supervising and controlling the everyday operations of a hospital, school, or prison are executive and legislative, rather than judicial, functions’.³⁰ The resulting and frequent impunity for constitutional violations can be seen as a form of American exceptionalism that I have explored elsewhere as ‘American extra-legality’³¹ to denote that the country in the world that has the most lawyers per capita and that frequently resorts to litigation so often achieves results that in many other democracies are associated with extra-legality. The link is underlined because John Yoo, after criticising American public law litigation and helping to restrict its use in American prisons,³² went on to become one of the authors of the infamous “torture memos” that unpersuasively attempted to legalise various forms of torture such as waterboarding after 9/11.

Some public law litigation, especially with respect to environmental threats to human rights, is now being attempted in American state courts. Unfortunately, there has been legislative pushback to such litigation. In addition, state courts have, at times, declined jurisdiction

²⁹ Yoo (n 18) 1139. For a recent account of how the courts thwarted plans to racially integrate Detroit’s public school see Michelle Adams *The Containment Detroit, the Supreme Court and the Battle for Racial Justice in the North* (Farrar, 2025).

³⁰ *ibid* 1140.

³¹ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge, CUP 2011) ch 4; Kent Roach, *Justice for Some: Comparative Miscarriages of Justice and Wrongful Convictions* (Cambridge, CUP 2026) ch 6.

³² Yoo (n 18) 1121.

on the basis of the American political questions doctrine.³³ This doctrine, which declares some areas of public policy to be non-justiciable, is not generally recognised in India or other democracies.³⁴ In short, the American retreat from public law litigation is an unfortunate example of *American backsliding* that, though started well before Trump, is accelerating. India should not follow the American retreat from public law litigation which has undermined the rule of law and provided frequent impunity for constitutional violations in the United States.

The Human Rights Origins of Indian Public Law Litigation

The courts of India have ordered innovative remedies that require ongoing supervision and positive government action.³⁵ The Supreme Court of India has explained in the landmark *Sheela Barse* case that in public interest litigation:

the court is not merely a passive, disinterested umpire or onlooker, but has a

³³ Jonathan L. Marshfield, 'Rethinking Structural Injunctions in State Constitutional Litigation' (2025) 85 La L. Rev 491; Myriam Gilles, 'An Autopsy of the Structural Reform Injunction: Oops ... It's Still Moving!' (2003) 58 U. Miami L. Rev 143.

³⁴ *Operation Dismantle v The Queen* [1985] 1 SCR 441.

³⁵ In one case involving a challenge to a law that only those who owned their rickshaws could be licensed, the court after several adjournments to gain the consent of the affected parties, issued detailed directions allowing non-owners to obtain a licence, but providing that they could receive interest free loans which would enable them to purchase their rickshaws. See *Azad Rickshaw Pullers Union v State of Punjab* AIR 1981 SC 14 at 15. Krishna Iyer J observed 'negative bans, without supportive schemes, can be a remedy aggravating the malady'. See also Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Government? Social Rights in a New South African Constitution' (1992) 141 U Pa L. Rev 1, 123–25.

*more dynamic and positive role with the responsibility for the organisation of the proceedings, moulding of relief and also supervising the implementation thereof. The court is entitled to, and often does seek the assistance of expert-panels, Commissioners, Advisory committees, Amici etc.*³⁶

Echoing Abram Chayes's description of the public law model, the Supreme Court of India observed that the 'relief is positive and implies affirmative action, the decision is not a "one-shot" determination but has on-going implications. Remedy is both imposed, negotiated or quasi-negotiated.... There is no formal, declared termination of the proceedings.'³⁷

A standard remedial device for public law litigation has been for a court to retain jurisdiction over a case, ask for further information and, at various stages of the litigation, make directions to the government. These directions encompass 'a wide spectrum of nuances and graduations [and] range from sparse indication of tentative guidelines to elaborate formulations'.³⁸ Relief is often in the form of 'a series of interim declarations' and 'monitoring compliance' over months or years.³⁹

³⁶ Sheela Barse v Union of India AIR 1988 SC 221, 2215 per Venkataramiah J (emphasis added).

³⁷ ibid [12].

³⁸ GL Peiris, 'Public Interest Litigation in the Indian Subcontinent: Current Dimensions' (1991) 40 ICLQ 67 at 82.

³⁹ Shyam Divan (n 4) 674.

India's expansion of public interest standing was necessary to increase access to justice, but the absence of directly affected persons in some public interest litigation may be a barrier to the implementation of a two-track approach that provides individual as well as systemic remedies.

The Importance of Individual Remedies

In their embrace of public law litigation, Indian courts have frequently moved straight to the continuing mandamus as a systemic remedy without considering whether individual remedies are a needed alternative or supplementary remedy.

In an attempt to enforce rights to speedy trials and limit pre-trial detention, the Supreme Court of India ordered the State of Bihar to prepare reports concerning the number of prisoners awaiting trial and made general directions concerning the need for bail reform, the provision of legal aid, the construction of new court houses and the appointment of new judges. Bhagwati J. made an analogy to cases in which American courts have attempted to reform prison conditions and stated:

The powers of this court in protection of the constitutional rights are of the widest amplitude and we do not see why this court should not adopt a similar activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right

*to a speedy trial.*⁴⁰

After gaining more information about the problem, the court also ordered guidelines governing the release of prisoners from pre-trial custody.⁴¹ This case remained with the Supreme Court for more than 15 years with at least seven subsequent judgments making directions to respond to the plight of prisoners including under trials.⁴²

North American courts have taken a different approach to speedy trial rights. They have relied on the individual remedy of a stay of proceedings once the accused's right to a trial in a reasonable time was violated.⁴³ This in turn has produced problems as it has completely left it to the executive and legislative branches to fashion a response. In addition, the strength of the individual remedy of a stay of proceedings has led to the dilution of the right to a speedy trial.⁴⁴ This suggests that a better approach to remedies for human rights violations is to avoid

⁴⁰ Hussainara Khatoon v State of Bihar AIR 1979 SC 1360 at 1377.

⁴¹ Hussainara Khatoon v State of Bihar AIR 1979 SC 1360 at 1379, 1819.

⁴² Mihika Poddar and Bhavya Nahar, "'Continuing Mandamus': A Judicial Innovation to Bridge the Right-Remedy Gap" (2017) 10 NUJS L.Rev 555 at 558. Reported cases include: Hussainara Khatoon (3) v State of Bihar (1980) 1 SCC 93 : AIR 1979 SC 1360; Hussainara Khatoon (4) v State of Bihar (1980) 1 SCC 98 : AIR 1979 SC 1369; Hussainara Khatoon (5) v State of Bihar (1980) 1 SCC 108 : AIR 1979 SC 1377; Hussainara Khatoon (6) v State of Bihar (1980) 1 SCC 115 : AIR 1979 SC 1819; Hussainara Khatoon (7) v State of Bihar (1995) 5 SCC 326.

⁴³ Barker v Wingo 407 US 514 (1974); R v Rahey [1987] 1 SCR 588 — both establishing stay of proceedings as a minimum remedy for violation of constitutional speedy trial rights.

⁴⁴ Daryl Levinson, 'Rights Essentialism and Remedial Equilibration' (1999) 99 Colum L Rev 857; Kent Roach, Due Process and Victims' Rights (Toronto, University of Toronto Press 1999) ch 3.

the extremes of India's purely systemic approach and North America's purely individualistic approach and to combine both individual and systemic remedies.

Prison Litigation in India

The Supreme Court of India has been particularly active in enforcing the rights of prisoners. In one case brought by a journalist, it directed that there should be separate lock-ups for female prisoners, and provisions made for legal assistance and female officers present during interrogations. The court also directed that a female judge:

*...shall make surprise visits to police lock-ups in the city periodically with a view to providing the arrested persons an opportunity to air their grievances and ascertaining what are the conditions in the police lock-ups and whether the requisite facilities are being provided and the provisions of law are being observed and the directions given by us are being carried out.*⁴⁵

If violations were found, the judge could bring them to the attention of the authorities and, if necessary, to the High Court for further redress. This approach could combine remedies for individuals for past or ongoing constitutional violations while also pursuing systemic

⁴⁵ Sheela Barse v State of Maharashtra AIR 1983 SC 378 at 382. The Court also appointed a professor of social work to investigate allegations that women prisoners in the Bombay Central Jail were being tortured. In the United States, judges have also appointed monitors or masters to inspect conditions in prisons. On one memorable occasion, Judge Garrity even spent the night in the jail under decree. See *Inmates of Suffolk County Jail v Eisenstadt* 360 F Supp 676 (D Mass 1973), 680–81 (reporting on smells, noises, insects and rodents in the prison).

remedies to prevent or minimise future ones.

A few years later, the same petitioner brought a case concerning the conditions under which children under 16 years of age were confined awaiting trial. The Supreme Court of India again made a number of directions including guidelines for expedited police investigations and requirements that the State provide remand homes or release the children on bail.⁴⁶ In a 1996 prison case, the Supreme Court of India made vague directions to the government to consider reform proposals prepared by the Law Commission and other bodies.⁴⁷

Vague directions or declarations increase the ability of the executive to make decisions about various ways to comply with the constitution. At the same time, they may not produce effective remedies if the government is not willing or does not have the capacity to comply with them.⁴⁸ Individual remedies including the release of individual

⁴⁶ *Sheela Barse v Union of India* AIR 1986 SC 1773. See also *Upendra Baxi v State of Uttar Pradesh* AIR 1987 SC 191.

⁴⁷ *Shri Rama Murthy v. State of Karnataka* (1996) INSC 1660.

⁴⁸ *Eldridge v British Columbia* (1997) 3 SCR 624, [96] concluding: ‘A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court’s directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. Fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.’ For commentary see Kent Roach, ‘Remedial Consensus and Challenge: General Declarations

prisoners may be necessary in addition to systemic remedies.

Unconstitutional conditions of confinement in India's prisons have continued. In a 2018 prison case, the Court aimed to reduce India's prisons to 150% of capacity. The case was started by a former Supreme Court Justice and involved 1,382 different prisons. The Court recognised that prison conditions in India are affected both by the high percentage of pre-trial detainees or undertrials and unfilled prison guard positions. The Court defended public interest litigation as giving 'a voice to millions of marginalised sections of society, women and children' and as 'one of the most important contributions of India to jurisprudence'.⁴⁹ Alas, much of the 2018 judgment dealt with procedures for appointing and paying judges to investigate prison conditions. Although attention to individual remedies will often be insufficient, they are a means to anchor public law litigation in concrete human rights violations.

In subsequent litigation the Court has expanded the issues to include medical facilities in jail, vocational training in jail and the use of technology to facilitate family visits with inmates. In 2024, the Supreme Court indicated that it was not satisfied with the progress reports received from a number of states including delays in approval for physical improvements to jails. Reports were received from 27

and Delayed Declarations of Invalidity' (2002) 35 UBC L Rev 211; Kent Roach, *Constitutional Remedies in Canada* (3rd edn, Thomson Reuters, forthcoming) ch 12.

⁴⁹ In re Inhumane Conditions in 1382 Prisons v State of Assam (2018) 10 SCJ 35, [3].

jurisdictions with four jurisdictions not filing reports as of November 2024. The Court directed that the state expedite improvements and file affidavits of compliance that would be signed by Chief Secretaries of the state as opposed to prison superintendents who as ‘the junior-most officer in the hierarchy, cannot be expected to have much of a say, real or persuasive, to get things done at the higher/highest level’.⁵⁰ This recognises the need for meaningful engagement by the executive with systemic reform.

The Court has also paid particular attention to numerous failures to provide adequate conditions for female prisoners. In November in 2024, it reminded the states of provisions that allow the release of undertrials imprisoned before trials after they have served significant periods of time in relation to their sentence if convicted. They added that while the provision in the law was gender neutral, ‘special efforts should be made to identify women prisoners who are entitled to release...’.⁵¹ As will be seen, this follows the pattern in the right to food case where the Court while maintaining the need for remedies for all persons also highlighted the particular need for remedies to benefit disadvantaged groups. It also reflects a 2022 report ordered by the Court and chaired by Justice Amitava Roy that documented poor conditions and gender discrimination in imprisonment such as most female prisoners sharing facilities with male prisoners, inadequate medical treatment, and lack of facilities for childcare. Focusing on

⁵⁰ In re Inhumane Conditions in 1382 Prisons 2024 INSC 461, [28].

⁵¹ In re Inhuman Conditions in 1382 Prisons (19 November 2024) unreported decision.

particular disadvantaged groups when crafting constitutional remedies may be a way to acknowledge suffering and provide meaningful but partial remedies, while also pursuing longer term systemic reform that would benefit all prisoners.⁵²

Prison Litigation in California

Despite legislative restrictions enacted in 1996, American courts have continued to engage in public law litigation about prisons. In 2011, the United States Supreme Court upheld a systemic order by three Federal Court District Court judges that California reduce its prison population to 137.5% of capacity in a 5:4 decision.⁵³ The decision responded to documented mistreatment and unnecessary deaths in California's prisons. Even the majority that upheld this exclusively systemic remedy admitted, however, that there were 'no scientific tools available to determine the precise population reduction necessary to remedy a constitutional violation of this sort'.⁵⁴

Justice Scalia in his dissent denounced the systemic remedy as 'the most radical injunction issued by a Court in our nation's history' and predicted that it would release '46,000 convicted criminals'.⁵⁵

⁵² The American approach is again exceptional and regressive in its new hostility to affirmative action. *Students for Fair Admissions v Harvard* 600 US 181 (2023).

⁵³ *Brown v Plata* 131 S Ct 1910 (2011).

⁵⁴ *ibid* 1944.

⁵⁵ *ibid* 1950.

Although California eventually complied with the population reduction order, the effectiveness of the remedy is in doubt. Consistent with the fluid nature of polycentric problems, an increase in prisoners held in local jails not subject to the systemic remedy has transferred the problem from state to local jails. This case started as a case about inadequate prison healthcare which unfortunately continues.

I have criticised the exclusively systemic focus of the California prison litigation elsewhere as follows:

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 admit remedial failure. The result was that the 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 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 health care and not about the public safety effects of reducing the prison population.... 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.⁵⁶

⁵⁶ Kent Roach (n 11) ch 7.3.1.

Justice Scalia contemplated the possibility of individual remedies including release of prisoners if that was the only way to receive constitutionally required health care.⁵⁷ He did not order such remedies, however, and as discussed above categorically rejected the systemic remedy upheld by the majority of the court. What is needed in complex prison litigation may not be the exclusively systemic remedies upheld by the majority in the California prison case or the exclusively individual remedies that Justice Scalia contemplated but did not order. What may be required are two-track remedies that include and combine both individual and systemic remedies.

The Need for Two-Track Individual and Systemic Remedies

The discontents of public law litigation call for some reforms. One approach contemplated by Justice Scalia's dissent in the California prison case is simply to focus on individual remedies such as damages, stays of proceeding and release of prisoners. This is better than that taken by Justice Alito in his dissent in the California prison case. Justice Alito arrogantly dismissed examples of 'shocking deficient health care' as 'anecdotal evidence' and was unprepared to contemplate either individual or systemic remedies.⁵⁸ Remedies are essential to the rule of law but inconvenient to authoritarian governments.

⁵⁷ *Brown v Plata* (n 53) 1958.

⁵⁸ *ibid* 1962.

Individual remedies are better than no remedy and they respond to the long-recognised principle, echoed by both Blackstone and Dicey, that it is a ‘vain thing to imagine a right without a remedy’.⁵⁹ As discussed above, one of the many problems of American ‘extra-legalism’ is that qualified immunities in many cases prevent even individual damage awards. The lack of any individual remedies when the state violates legal rights will erode the rule of law and often democracy as governments become comfortable in the knowledge that they can violate the rights of the unpopular and ‘enemy’ groups with impunity. That said, even robust individual remedies will not respond to the conditions of the modern bureaucratic state that result in recurring and sometimes massive constitutional violations. As I have argued elsewhere, ‘at the starkest level, damages allow states to pay a fine (and raise taxes) for violating human rights’.⁶⁰

What is needed is a two-track approach that provides both individual and systemic remedies. Indian courts have in some cases moved in the direction of a two-track approach. For example, in the ongoing case involving 1382 prisons, the Indian Supreme Court has encouraged local courts to award damages in cases of unjustified deaths noting 500 “unnatural” deaths in India’s prisons between 2012 and 2015.⁶¹ This is an improvement on the California prison cases where similar unnecessary deaths of prisoners from inadequate medical treatment

⁵⁹ *Ashby v White* (1703) 92 ER 124, 136.

⁶⁰ Kent Roach (n 11) ch 7.5.1.

⁶¹ Supreme Court of India, *In Re Inhuman Prison-1382 Prisons*, Writ Petition (Civil) No 406 of 2013 (15 September 2017).

was noted by the judges in passing but not addressed by individual remedies. Steven Budlender, Gilbert Marcus and Nick Ferreira in their work on South African public interest litigation have stressed the importance of small tangible and meaningful remedies even while longer term systemic steps are being undertaken.⁶² The individual remedies can play to judicial strengths and provide some remedy while more systemic remedies are developed in consultation with the intended beneficiaries of the remedies. This approach transcends theoretical dichotomies between weak and strong form judicial review and remedies.⁶³

The provision of individual remedies can provide a measure of remedial success. The lack of success and slowness of much public law litigation makes the courts vulnerable to a loss of confidence and populist attempts to curb public law litigation that have been quite successful in the United States. The award of individual remedies as a supplement and amplification of a continuing mandamus can make the consequences of continuing constitutional violations crystalize clear to the media and the interested public. Charles Epp has recognised that ‘graphic’ injustices suffered by individuals can provide ‘powerful incentives for reform’,⁶⁴ and Veronika Fikfak has similarly noted that

⁶² Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Capetown, Atlantic Philanthropies 2014).

⁶³ See generally Mark Tushnet, *Weak Courts, Strong Rights* (Princeton UP 2009) 244–247. For attempts to combine elements of strong and weak form judicial review including with respect to remedies see Rosalind Dixon, *Responsive Judicial Review* (OUP 2023) ch 7.

⁶⁴ Charles Epp, *Making Rights Real: Activists, Bureaucrats and the Creation of the*

a technocratic focus on systemic directions and statistics can be ‘psychologically numbing’ whereas a focus on a single victim or remedy has an ‘immediacy’.⁶⁵ This may be a better way for judges engaged in public interest litigation to command public attention as opposed to off-the-bench critical comments of governments, however popular such comments may sometimes be.⁶⁶ Individual remedies may also help retain the confidence and spirit of litigants, directly affected groups, and civil society as the courts and government struggle with longer term systemic remedies.

Remedial approaches that focus exclusively on individual or systemic remedies are partial. Supra-national law avoids such dilemmas by ordering both specific measures designed to provide a remedy for the individual and general measures designed to prevent similar violations in the future. They often require the responsible government to report back on the efforts they have taken to prevent similar violations in the future.⁶⁷ To be sure, domestic courts have more robust remedial powers including the powers of ordering mandatory injunctions and punishing governments or governmental officials for contempt of court for their violation. Nevertheless, courts are often reluctant to engage in such coercive and potentially confrontational responses.

Legalistic State (University of Chicago Press 2009) 93–165, 228.

⁶⁵ Veronika Fikfak, ‘Changing State Behaviour: Damages before the European Court of Human Rights’ (2019) 29 EJIL 1091, 1113.

⁶⁶ Chintan Chandrachud, ‘Anticorruption by Fiat: Structural Injunctions and Public Interest Litigation in the Supreme Court of India’ (2018) 14(2) Socio-Legal Rev 170.

⁶⁷ Kent Roach (n 11) ch 2.

Even when they are prepared to do so, as in the California prison case, the result may not always be remedial success.

In what follows I will provide some examples taken from Indian, comparative and supra-national law of two-track remedial strategies. To be sure, two-track remedial strategies will differ in different contexts and countries. Litigants and courts may decide in some contexts to stress individual remedies and in other contexts to stress systemic remedies. Some individual remedies may focus on disadvantaged groups. Nevertheless, both individual and systemic remedies are generally necessary.

The use of two-track remedial strategies does not guarantee remedial success. Individual remedies such as damages or even release from prison will often not make victims whole, from the irreparable harm of human rights violations. In addition, systemic remedies are often difficult to achieve and to maintain. That said, one of the virtues of the two-track strategy is that it is attentive to remedial failure and that it can result in learning from past failures. The two-track approach lends itself to an iterative process where courts continue to be responsive to individual acts of injustice while not ignoring the larger institutional and societal determinants that produce recurring constitutional violations.

Structural Injunctions and Continuing Mandamus

The Indian courts have been the global leader in ordering structural injunctions and retaining jurisdiction as a constitutional remedy. As the South African Constitutional Court has recognised, this is a legitimate remedy that is also used in other democracies.⁶⁸ That said, concerns have been raised about the performance of Indian courts when using this remedy. Chintan Chandrachud has expressed concerns that the Supreme Court, especially in the latter phases of public law litigation targeting corruption, has engaged in micro-management often without tangible success.⁶⁹ Justice Katju of the Supreme Court of India, in a manner not dissimilar to that of John Yoo, has suggested that structural injunctions offend the separation of powers and regulate “matters pertaining exclusively to the executive or legislative domain.”⁷⁰

A two-track approach would encourage courts to order remedies to respond to or prevent irreparable harm to constitutional rights while retaining jurisdiction in the quest for systemic reform. Individual remedies can be likened to interlocutory relief or injunctions within a

⁶⁸ *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC).

⁶⁹ Chintan Chandrachud, ‘Structural Injunctions and Public Interest Litigation in India’ in Po Jen Yap (ed), *Constitutional Remedies in Asia* (Routledge 2019) 121.

⁷⁰ *Divisional Manager, Arvali Golf Club v Chandler and Hass* 2008 AIR SCW 406 [26]. Justice Katju elaborated: ‘If the legislature or the executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations, or by other lawful methods e.g. peaceful demonstrations. The remedy is not in the judiciary taking over the legislative or executive functions, because that will not only violate the delicate balance of power enshrined in the Constitution, but also the judiciary has neither the expertise nor the resources to perform these functions.’ *Ibid* [31]. See also *State of UP v Jeet S Bisht* 2007 AIR SCW 3427 [35].

continuing mandamus. The focus could be on preventing irreparable harm. This would provide the court with some remedial successes and symbolise the real-world stakes of what is at stake. A two-track approach could better anchor litigation in the actual experience of petitioners and respond to concerns that public law litigation has become too unpredictable and can occur whenever a judge concludes ‘that some aspect of governance can benefit from a judicial heave’.⁷¹

One factor that may make the two-track approach difficult to achieve in Indian public law litigation is that broad standing rules allow litigation by those who are not directly affected. Even if present at the start of litigation, directly affected petitioners frequently drop out during long litigation and are replaced by *amicus curiae*. As Derrick Bell recognised long ago, it is important for those directly affected to have a say in remedies.⁷² In the two-track approach, those who have directly suffered a constitutional violation should have influence over individual remedies that are meant to help them. Some American prison litigation has attempted to give the prisoners a greater voice in the litigation.⁷³ Others with technical expertise may be more helpful in formulating systemic remedies. Remedies for human rights violations are about acknowledging and attempting to end and repair human

⁷¹ Shyam Divan (n 4) 677.

⁷² Derrick Bell, ‘Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation’ (1976) 85 Yale LJ 470.

⁷³ Jules Lobel, ‘Participatory Litigation’ (2022) 74 Stanford L Rev 87; Michael Jackson, *Prisoners of Isolation* (University of Toronto Press 1983).

suffering. They should not be an exclusively technocratic or systemic endeavour.

A two-track approach would also combine injunctive or declaratory relief designed to achieve systemic reforms with damages and other remedies, such as habeas corpus, that provide tangible relief to directly affected individuals. Although individual remedies in socio-economic rights litigation are vulnerable to criticism as a form of potentially regressive queue jumping, there is growing support for their necessity.⁷⁴ Perfect justice should not be the enemy of more justice.

Constitutional litigation against police misconduct in India has often focused on systemic reforms such as requiring the police to wear identifying badges and to install video cameras.⁷⁵ Even partial compliance with such remedies could have benefits. At the same time, such systemic remedies are vulnerable to both resistance and lack of capacity (including budget) in the executive as well as charges of inept judicial micro-management. Even when systemic remedies are adopted, there is a danger that the police and other members of the executive will find ways to circumvent them. The two-track approach

⁷⁴ See Tara Melish, 'Rethinking the "Less as More" Thesis: Supranational Litigation of the Economic, Social, and Cultural Rights in the Americas' (2006) 39 NYU J Intl L & Pol 171; Katharine Young, 'Rights and Queues' (2016) 55 Colum J Transnatl L 65; Kent Roach, 'Polycentricity and Queue-Jumping in Public Law Remedies' (2016) 66 UTLJ 3; Katharine Young, *The Future of Social and Economic Rights* (CUP 2019); Edward Becharard-Torres, 'Giving Individual Remedies in Social Rights Litigation Their Due' (2024) 2(1) Comp Const Stud 80; Olatunde CA Johnson, 'The Missing Half: Revisiting Monetary Remedies to Redress Racial Segregation' (2024) 29(2) Harv CR-CL L Rev 277.

⁷⁵ *Shri Dilip K Basu v State of West Bengal* (2015) INSC 508; *People's Union for Civil Liberties v State of Maharashtra* 2014 (10) SCC 635.

would respond to some of these concerns by including damage and release remedies for those who suffered particularly egregious violations.

The Importance of Dialogue with the Executive and the Legislature and the Right to Food Litigation

The right to food litigation has generally been viewed by commentators as a somewhat rare success story in Indian public law litigation. Prof. Mark Tushnet has observed that ‘ordering that food be on hand be distributed is counter-bureaucratic, perhaps, but not obviously counter-majoritarian’.⁷⁶ The Indian Supreme Court retained jurisdiction for 17 years and issued over sixty interim orders. The court-appointed experts to investigate violation of its interim orders and took starvation deaths as evidence of their breach. This meant that suffering and avoidable deaths was not ignored by the court. Although the litigation leaned heavily on systemic reform, this approach allowed the court not to ignore individual violations.

Part of the success of the litigation was successful engagement with state and national governments including the enactment of national food legislation in 2013 which tracked many of the court’s orders.⁷⁷

⁷⁶ Mark Tushnet, ‘The Indian Constitution Viewed from the Outside’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 1026.

⁷⁷ Hiranmayee Mishra, ‘“The Food Must Reach the Hungry”: Lessons from Judicial Enforcement of the Right to Food in India’ (2024) 24 *Global Jurist* 203.

Similarly, public law litigation with respect to sexual harassment of women has been described as ‘explicitly dialogic in form, seeking to prod the legislature into enacting legislation against gender discrimination while creating what was, again explicitly, an interim remedy’.⁷⁸ My point is not that the legislation solved the problems of either starvation or sexual harassment, but that it provided a firmer basis for continuing efforts and remedies than court orders alone.

A two-track remedial strategy that has been used in Canada and South Africa is for courts to hold inadequate legislation to be unconstitutional while suspending the declaration of violation to encourage the legislature to enact better legislation. This remedy differs from the declaration of incompatibility used in the United Kingdom and New Zealand because the declaration of invalidity will eventually take effect should the legislature not act. Another important development used frequently in South Africa, and more recently recognised in Canada,⁷⁹ is that during the suspension, the court can order individual remedies designed to ensure that individuals are protected from irreparable harm to their constitutional rights while legislatures devise better systemic approaches.⁸⁰ Such complex

⁷⁸ Mark Tushnet (n 76) referring to *Vishaka v State of Rajasthan* (1997) 6 SCC 241, where the Court defined sexual harassment and recommended a range of preventive, complaint and remedial measures. The national legislature enacted the Sexual Harassment of Women at Workplace Act 2013.

⁷⁹ *Carter v. Canada* 2016 SCC 4; *Ontario (Attorney General) v. G* 2020 SCC 38.

⁸⁰ See generally Kent Roach (n 11) ch 4. The Indian Supreme Court similarly proclaimed directions in an attempt to limit sexual harassment in 1997 with the national legislature eventually enacting legislation in 2013: *Vishaka v State of Rajasthan* (1997) 6 SCC 241; Protection of Women from Domestic Violence Act 2005, No 43 of 2005; Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

remedial approaches combine dialogic systemic remedies that allow the legislature to act with individual judicial remedies that protect petitioners from irreparable harm to their constitutional rights.

The enactment of legislation or better executive policies in response to public law litigation may not necessarily end judicial involvement. There has been recent follow-on litigation from the right to food litigation stemming from the effects of draught on food supply. The Court has stressed the failure of some states to implement the *National Food Security Act*, 2013. Some commentators have criticized the Court in this case for usurping the role of state governments,⁸¹ but the two-track remedial approach contemplates that courts may have to play a more active remedial role in the face of default and inaction from the executive and/or legislature. The Court in 2016 stated ‘it is high time that the machinery under the NFS Act is put in place by all concerned otherwise the enactment of social justice legislations will have no meaning at all...Deliberate inaction in the implementation of a parliamentary statute by a State Government can only lead to utter chaos or worse.’⁸² In that case, three years had passed since the enactment of national legislation. The Court’s impatience with the laggard response of some states seems justified.

See also Aparna Chandra, ‘Book Review’ (2018) 16 Int J Const L 710, 716; Rehan Abeyratne and Didon Misri (n 7) 378–9.

⁸¹ Rehan Abeyratne and Didon Misri (n 7) 378–9.

⁸² *Swaraj Abhiyan v Union of India* (2016) SCC OnLine SC 508 [10], [12].

It will be important in such contexts for the courts to document executive and legislatures failures. Such failures can be underlined by providing a concrete individual remedy for past or ongoing violations, and adopting less deferential and more intense systemic remedies going forward.

The Two-Track Approach as Applied to the Ongoing Re Inhuman Conditions in 1382 Prisons Litigation

The ongoing prison litigation in *Re Inhumane Conditions in 1382 Prisons* may be moving in the direction of a two-track approach. As in the California prison case, there is a danger that a purely systemic approach, focused on improving the physical plant and building more prisons, may have unanticipated adverse effects and not provide a meaningful remedy for prisoners. The Court is, to its credit, trying to engage the executive at the highest level by requiring them to sign affidavits of compliance. In late 2024, the Court hinted that individual remedies may be coming by reminding states of legislative obligations to release some prisoners after they have served long periods in pre-trial detention.⁸³ The court hinted that priority should be given to the release of female prisoners who, as it has documented, have been exceptionally harmed by poor prison conditions. Justice Louise Arbour, in a 1987 public inquiry into poor conditions and misconduct

⁸³ For my examination and criticism of some of the restrictions placed on these provisions in the 2023 criminal procedure law see Kent Roach, 'Wrongful Convictions, Wrongful Prosecutions and Wrongful Detentions in India' (2024) 35 NLSI Rev 250, 298–299. Courts should in principle not be bound by this restrictive law to the extent that it found that release was necessary as a remedy for a continuing constitutional violation.

in Canada's then only prison for women, had recommended a similar release remedy as appropriate in serious cases. She also proposed systemic remedies that eventually led to the prison being closed and regional jails being established so that female prisoners could be confined in better conditions and closer to their families.⁸⁴

A two-track approach to prison public law litigation would combine retention of jurisdiction with orders and reporting requirements on the systemic track while using release of prisoners, damages, and other more specific remedies as appropriate. This could make the litigation more meaningful to the prisoners who are beneficiaries of individual and interim remedies. It could provide some tangible remedial successes. It could also make governments and the public aware of the consequences for both prisoners and society of continuing constitutional violations.

A New Canadian Constitutional Remedy: Declarations Plus and the Retention of Jurisdiction

Unlike Indian courts, Canadian, and to a lesser extent South African, courts have been reluctant to retain jurisdiction. They have often relied

⁸⁴ Louise Arbour, *The Prison for Women in Kingston* (Supply and Services Canada 1996). Justice Arbour concluded that a new remedy was needed to ensure the rule of law in prisons. She recommended: 'If illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court, a reduction of the period of imprisonment may be granted, such as to reflect the fact that the punishment administered was more punitive than the one intended.' She noted that such individual remedy would provide 'an effective redress which is responsive to the infringement of right that has occurred.'

on declaratory relief that ends the court's involvement with the case. In Canada, this has forced successful litigant to commence new litigation when the declaration did not produce an effective remedy.

The Supreme Court of Canada in a 5:4 decision upheld the retention of jurisdiction in a complex minority school case. This precedent is rarely used in Canada because of warnings made by the dissenters that the trial judge's order, that the government should make its 'best efforts' and report on its progress, was not clear enough to be enforced through contempt of courts.⁸⁵

After finding violations, courts will often not have sufficient information to make specific orders. Even if they do, this may result in grudging, by-the-letter compliance. The trial judge's 'best efforts' order made sense and was effective in large part because the trial judge retained jurisdiction over the case and ordered the provincial government to submit periodic affidavits on its progress in building new schools that would comply with the francophone minority's constitutional rights. This approach was a blending of declaratory and injunctive relief that I have called the 'declaration plus'⁸⁶, an intermediate remedy that has recently been recognised by Canadian courts. The 'declaration plus' accords with recent scholarship on public

⁸⁵ Doucet-Boudreau v Nova Scotia (Minister of Education) 2003 SCC 62.

⁸⁶ Kent Roach, 'A New Constitutional Remedy: The Declaration Plus' (2026) 47(1) Natl J Const L (forthcoming); Kent Roach, *Constitutional Remedies in Canada* (3rd edn, Thomson Reuters, forthcoming) ch 12; Robert J. Sharpe and Kent Roach *The Canadian Charter of Rights and Freedoms* 8th ed (Irwin, forthcoming) ch.17.

law litigation which stresses that successful public law litigation should not depend on a ‘heroic judge’⁸⁷ using ‘command and control’⁸⁸ strategies.

In *Ontario v. Restoule*,⁸⁹ the Supreme Court concluded unanimously that a simple declaration that Ontario had breached an 1850 Treaty with Indigenous groups by not augmenting \$4 payments since 1875 would not be sufficient. Instead, the Court gave the parties a six-month window to negotiate an agreement and failing an agreement, for governments to increase the Treaty payments. This would not end the court’s involvement because the way the government exercised its discretion could be reviewed for constitutional compliance. Moreover, the courts would have the full range of remedial powers, including powers to award damages and issue mandatory relief if needed, to remedy any remaining constitutional violation. The ‘plus’ in the declaration potentially involved the full range of the court’s remedial powers as well as effective retention of jurisdiction by the courts.⁹⁰

⁸⁷ Margo Schlanger, ‘Beyond the Hero Judge: Institutional Reform Litigation as Litigation’ (1999) 97 Mich L Rev 6. The reference to the hero judge speaks to the influential work of Owen Fiss: see Owen Fiss, *The Civil Rights Injunction* (Indiana UP 1978).

⁸⁸ Charles Sabel and William Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ (2004) 117 Harv L Rev 1016.

⁸⁹ *Ontario v. Restoule* 2024 SCC 27.

⁹⁰ The Court itself did not retain jurisdiction but only because the trial judge in the case had not yet decided the appropriate remedy in a bifurcated trial. This was also the case in an earlier minority language school case. In that case, the Supreme Court of Canada upheld a trial judge’s preliminary declaration of a violation of constitutional rights even though the judge reserved the right, if necessary, to order additional and stronger remedies: *Association des parents de l’école Rose des vents v British Columbia (Education)* 2015 SCC 21, [63].

The ‘declaration plus’ could play a role in encouraging courts to enforce socio-economic rights and respond to the existential threat of global warming. In a recent climate change case, the Ontario Court of Appeal rejected an attempt by the government of Ontario to characterise the applicant’s remedial request ‘that the court assume judicial control over environmental and climate policy’ as an unmanageable and inherently non-justiciable request.⁹¹ In rejecting such arguments, the Court of Appeal cited the Supreme Court’s frequent reliance on declaratory relief. In complex public law cases, however, the declaration plus may be a better but still judicially manageable remedy. For example, a ‘declaration plus’ could allow the government to select a target for emission reductions and require periodical reports from the government in affidavit form, subject to cross examination by the parties. This would allow the court to become better informed in a fair and transparent manner about a dynamic and complex situation, and to develop manageable and practical remedies. This would stop far short of the spectre of the court assuming managerial control over climate policy. As I have argued elsewhere, ‘the requirement that injunctions be specific and enforceable places trial judges in a bind or a Catch-22, especially when dealing with novel issues like climate change.’⁹²

⁹¹ *Mathur v Ontario* 2024 ONCA 762 [67]; *La Rose v Canada* 2023 FCA 241 [51]. For arguments about the possible role of the declaration plus in climate change litigation see Kent Roach, ‘Judicial Remedies for Climate Change’ (2021) 17 J L & Equality 105

⁹² Kent Roach (n 92) 125.

Use of the ‘declaration plus’ might help Indian courts avoid charges of inept micromanagement while not abandoning the many advantages of retaining jurisdiction and the need for systemic remedies that involve positive action by the executive. It also responds to the dangers that a simple declaration may not result in an effective and meaningful remedy and that it may force costly fresh litigation over the same matter should there be remedial failure. The ‘declaration plus’ allows the adjudicator to retain jurisdiction, obtain more information in a fair and transparent manner that is subject to adversarial challenge and, if necessary and with fair notice to the parties, order supplemental remedies. The ‘declaration plus’ may be a means to manage the complexity of polycentric problems.⁹³

The Indian approach which relies on continuing mandamus could be defended as a stronger remedial approach than the Canadian ‘declaration plus’ because the courts can use civil contempt powers. At the same time, the threat of punishing the government or officials for contempt for violating mandatory orders can be counterproductive and hollow. After surveying Indian cases, Mihika Poddar and Bhavya Nahar concluded in 2017 that the Indian courts rarely punished for contempt and instead often revised their orders or gave the

⁹³ Lon Fuller’s work is sometimes simplified and reduced to the categorical idea that courts should avoid multifaceted polycentric problem and stick to what Chayes identified as the received tradition of courts only resolving disputes over past wrongs. See Lon Fuller “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353. For a more nuanced interpretation of Fuller see Roach “Polycentricity and Queue Jumping in Public Law Remedies” (2016) U.T.L.J. 3; Jeff King *Judging Social Rights* (CUP, 2012).

government more time to comply.⁹⁴ It is an open question what effects such compromising strategies have on courts and governments. The declaration plus can accommodate judicial reluctance to punish government officials with contempt. At the same time, the declaration plus, consistent with the model of public law litigation, would allow a court to retain jurisdiction over a case.⁹⁵

The Need for Engagement and Negotiation but the Dangers of Inequality of Bargaining Power

The South African courts in their second-generation housing right cases have encouraged engagement between the affected parties and the government.⁹⁶ This reflects a sense that the courts are not well equipped to make polycentric decisions about the distribution of scarce resources, and that negotiation may allow the immediate needs and priorities of the most disadvantaged in South African society influence governmental policy. A similar recognition of the importance of negotiation is also seen in most accounts of American public law litigation including that of Prof. Chayes who observed that remedies were frequently negotiated and not imposed.⁹⁷

⁹⁴ Mihika Poddar and Bhavya Nahar (n 42) 602-604.

⁹⁵ In South Africa, the Constitutional Court's refusal to retain jurisdiction in 'Treatment Action Campaign had disastrous effects when some states lagged or failed to provide drugs to stop mother-to-child HIV transmission. See Kent Roach and Geoff Budlender, 'Mandatory Relief: When is it Appropriate, Just and Equitable?' (2005) 122 SALJ 325.

⁹⁶ Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7, 2005 (1) SA 217 (CC); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg (24/07) [2008] ZACC 1, 2008 (3) SA 208 (CC).

⁹⁷ Abram Chayes (n 1) 1302.

Although there is much to be said about engagement, consultation, and negotiation, there is a danger that it will replicate power imbalances. Two years after Prof. Chayes wrote his pioneering study of public law litigation that stressed the importance of negotiated relief, Prof. Owen Fiss, while agreeing that public law litigation was necessary, raised concerns that the judge's desire to be efficacious had the potential to threaten the objectivity and autonomy of judicial reasoning. In subsequent work he was also a leading critic of alternative dispute resolution, arguing that it avoided judgment and replicated power imbalances.⁹⁸

There is a danger that courts may apply an overly deferential standard to governments when evaluating the outcomes of negotiation. They may penalise applicants who, perhaps for good reasons, become frustrated with consultation and walk away from a table that they do not think will produce a fair result. The Supreme Court of India has recognised that judicial deference should be limited when it observed that while ‘unduly harsh and coercive measures against the States and the authorities might themselves become counter-productive’ and that ‘the willing co-operation of the authorities must, as far as possible, be explored’, but that ‘coercive action would, of course, have to be initiated if persuasion fails’.⁹⁹

⁹⁸ Owen Fiss, ‘Foreword: The Forms of Justice’ (1978) 93 Harv L Rev 1; Owen Fiss, ‘Against Settlement’ (1984) 93 Yale LJ 1073.

⁹⁹ *Sheela Barse v Union of India* AIR 1988 SC 2211, 2219. See also GL Peiris, ‘Public Interest Litigation in the Indian Subcontinent: Current Dimensions’ (1991) 40 ICLQ 67, 81 (‘public interest litigation “directed towards fruitful co-operation among legislature,

Some Canadian cases dealing with the rights of Indigenous peoples provide some remedial strategies in guarding against power imbalances. One approach would be to issue interlocutory or interim remedies to prevent irreparable harm during the period of negotiation. Another would be for the court to establish time limits for negotiation and only give the successful constitutional plaintiff the right to seek an extension from the time limits, while also maintaining that the court will determine the constitutional adequacy of any settlement and that it can use its full range of remedies to respond to any unconstitutional actions by the government during the negotiation.¹⁰⁰ The South African Constitutional Court has also similarly indicated that during engagement ‘a case can always be brought in the High Court in relation to particular occupiers with specific allegations as to the respects in which the housing obligations imposed by the Constitution have not been complied with’.¹⁰¹ In India, such an approach would be backstopped by Articles 32 and 226 of the Constitution which guarantee the ability of both the High Courts and the Supreme Court to consider petitions for constitutional relief and order constitutional remedies.

executive and judiciary in pursuit of social justice”’).

¹⁰⁰ Ontario (Attorney General) v Restoule 2024 SCC 27. For discussion see Kent Roach, ‘A New Constitutional Remedy: The Declaration Plus’ (2026) 47(1) NJCL (forthcoming); Kent Roach, Constitutional Remedies in Canada (3rd edn, Thomson Reuters, forthcoming) ch.12.

¹⁰¹ Occupiers of 51 Olivia Road (n 97) [35].

The Potential for Adding Systemic Aspects to Individual Remedies Such as Damages

Chayes associated the damage remedy with a backward-looking dispute resolution approach to litigation and the injunction remedy with the forward-looking public law model of adjudication. This underestimates the ability of damages and other remedies for the constitutional violations of individuals to also express forward-looking concerns about systemic reforms that hopefully will prevent similar constitutional violations in the future. In other words, damages and constitutional remedies for individual accused in the criminal justice system can be employed in a two-track manner that seeks both individual and often compensatory justice and more forward-looking concerns about future constitutional compliance.¹⁰²

The New Zealand courts have taken an elegant approach to damages for violation of its Bill of Rights which can be seen as a two-track approach. They have not hesitated to award compensatory damages for violations of human rights. As Justice Blanchard has explained in a leading case, the level of damages awarded will also ‘reflect the other ways in which the State has acknowledged the wrongdoing: whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent recurrence; and whether it has publicly apologised to the victim in appropriate terms’.¹⁰³ The Indian

¹⁰² Kent Roach, *Remedies for Human Rights Violations* (n 11) chs 5–6.

¹⁰³ *Taunoa v Attorney General* 2007 NZSC 70, [262]. Another court indicated it would have increased damages in a police misconduct case if the responsible officer had not been

courts have also expanded their understanding of compensation in constitutional damage cases to include non-monetary relief including apologies.¹⁰⁴

Courts in a two-track approach would provide the state with an opportunity to mitigate damages or other individual remedies such as stays of proceedings, exclusion of evidence or sentence reductions by showing that it had taken reasonable steps to prevent similar violations in the future.¹⁰⁵ This would also help place on the judicial record how the state has responded to past violations. Higher damages and stronger individual remedies may be more easily justified in cases where the state has not taken reasonable efforts to prevent similar violations in the future. Even individual remedies can have a systemic aspect.

Some Indian cases have followed this two-track approach. In 1979, the Indian Supreme Court accepted a petition from a death row prisoner on the basis that another person was being physically assaulted and tortured because he would not provide his jailers with money. A Supreme Court bench that included Justice Krishna Iyer converted this complaint to a habeas corpus writ and ordered not only that the torture and corporal punishment of the named prisoner cease but also a variety

disciplined: *Falwasser v Attorney General* [2010] NZAR 445 [36]–[37], [124].

¹⁰⁴ *People's Union for Civil Liberties v State of Maharashtra* 2014 (10) SCC 635; *Nilabati Behera v State of Orissa* AIR 1993 SC 1960.

¹⁰⁵ *Ward v Vancouver* 2010 SCC 27. See also Kent Roach, 'Reclaiming Prima Facie Exclusionary Rules' (2000) 43(3) *Man LJ* 1.

of systemic remedies. These included visits by legal aid lawyers and judges to the prison, the development of prisoner grievance procedures, and judicial approval of any additional punishment including use of solitary confinement, diet changes, and prison transfers.¹⁰⁶ This can be seen as an early recognition of a two-track approach that was attentive to the need for both individual and systemic remedies.

In a 1996 case, the Indian Supreme Court awarded an individual petitioner constitutional damages for a violation of health care rights while also making directions to state hospitals to create a centralized communication system so they could direct other patients to public hospitals that could treat them.¹⁰⁷ Another case combined damages for exposure to asbestos with directions designed to improve worker safety in the future.¹⁰⁸

The use of damages can provide both an anchor and a measure of remedial success in public law litigation to vindicate human rights. Indian courts have in some cases already employed a two-track approach that combines individual and systemic remedies.

The Reality of Remedial Failures and the Need for Iterative Cycles of Two-Track Remedies

¹⁰⁶ Sunil Batra v Delhi Administration AIR 1980 SC 1579.

¹⁰⁷ Paschim Banga Khet Mazdoor Samity v State of West Bengal (1996) 4 SCC 37.

¹⁰⁸ Consumer Education & Research Centre v Union of India (1995) 3 SCC 42.

India remains the country in the world most committed to public law litigation. In the United States, such litigation, especially in the prison reform context, is restrained by legislation and precedents restricting the role of the courts. In Canada, public law litigation also struggles given the Supreme Court's warnings about the need for clear and enforceable orders and it remains to be seen whether the nascent recognition of the declaration plus will result in courts retaining jurisdiction in more cases. The South African courts have been somewhat more active than the Canadian courts, but not as active as the Indian courts. From the late 1970's on, Indian courts have recognised that systemic relief through public law litigation is necessary given the difficulties that the most disadvantaged face in gaining access to justice and the burdens placed on the courts.

Although public law litigation has persisted in India, and some aspects of it with regards to litigation aimed at corruption have even been popular,¹⁰⁹ there is a need to improve the practice and results of such litigation especially when devising constitutional remedies for past and ongoing human rights violations. Some judges of the Indian Supreme Court and commentators have raised concerns about abuse of Indian public law litigation that may strain judicial competence, result in counterproductive decisions and adversely affect the judiciary's legitimacy.¹¹⁰ The failures of public law litigation in India are not a

¹⁰⁹ Chintan Chandrachud, 'Anticorruption by Fiat: Structural Injunctions and Public Interest Litigation in the Supreme Court of India' (2018) 14(2) Socio-Legal Rev 170.

¹¹⁰ Divisional Manager, Aravali Golf Club v Chandler 2008 AIR SCW 406; Shyam Divan (n

reason for abandoning it. Constitutional remedies, like many human endeavours, often fail. Remedial failure is a pervasive phenomenon that is better documented in international than national law.¹¹¹ Recognising remedial failure also acknowledges that most successful reform requires time and an iterative approach.

The right to food litigation has won wide-spread praise, but concerns have been raised that other forms of public law litigation have not achieved results despite decades of litigation and that some, especially those in the housing context, have even had counterproductive effects.¹¹² Public law litigation to vindicate the human rights of the disadvantaged and the unpopular is vulnerable to a populist backlash that may be aimed at judges, *amicus curiae*, or the often unpopular groups and minorities that are the intended beneficiaries of the litigation. There is no ground for complacency.

The two-track approach to remedies is attentive to remedial failure and can stimulate cycles of increasing individual and systemic remedies. By placing more emphasis on individual remedies than has traditionally been the case in Indian or American public law litigation, the two-track approach can also produce some measure of remedial success albeit more modest success than the often grand ambitions of systemic

4) 678–79.

¹¹¹ Courtney Hillebrecht, Domestic Politics and International Tribunals: The Problems of Compliance (CUP 2014).

¹¹² Anuj Bhunia, Courting the People: Public Interest Litigation in Post-Emergency India (CUP 2017).

litigation. For example, the release of prisoners as part of the ongoing prison public law litigation *in Re Inhumane Conditions in 1382 Prisons* could prevent some of them from continuing to suffer constitutional violations. To be sure, this would be a limited victory and there would still be a need for systemic reforms. Release of prisoners could also make clear to governments and the public that there will be consequences for continued constitutional violations. Another example of moving towards a two-track approach in this ongoing case is a 2017 judgment where the Indian Supreme Court encouraged local courts to award damages in cases of unjustified deaths in prison.¹¹³ In short, Indian courts can and should where appropriate order individual and interim remedies during a continuing mandamus.

The two-track approach can also be applied when individual remedies such as constitutional damages are awarded and when courts order remedies for the individual accused in criminal trials. Following approaches taken in New Zealand, courts could provide the state an opportunity to report on the steps that have been taken to prevent similar violations in the future. If unreasonable steps or no steps have been taken, this could be a basis for the court increasing damages to signal both judicial disapproval and ongoing problems. If reasonable steps have been taken, a court might reduce damages (while ensuring that they still provided adequate compensation for the past violation) or award a less drastic but still adequate remedy.

¹¹³ Supreme Court of India, Writ Petition (Civil) No 406 of 2013 *In Re Inhuman Prison – 1382 Prisons* (15 September 2017).

Conclusion

The constitutional guarantees of remedies in Article 32 and 226 of the Indian Constitution have rightly been described as its heart and soul. These articles provide a more solid foundation for constitutional remedies which in the United States have been subject to restrictions through ordinary legislation.

India was an early adapter of a forward-looking public law litigation pioneered in American school desegregation and prison cases. Although India was influenced by the American example when, under the leadership of Justices Bhagwati and Krishna Iyer, it first adopted public law litigation, India should not follow the American example of severely restricting such litigation through legislation and restrictive standing and causation requirements.

This conclusion does not, however, mean that complacency is in order or that improvements cannot be made. Courts should attempt dialogically to engage the executive and the legislatures in systemic reforms. It is a good thing when public law litigation results in national legislation addressing such topics as the right to food and the sexual harassment of women. That said, the enactment of legislation itself may still produce remedial failures that the courts should address both through individual and systemic remedies. As in South Africa, Indian courts should also promote engagement between governments and the intended beneficiaries of systemic remedies while following some

Canadian and South African examples of attempting to address inequalities of bargaining power in part by awarding individual remedies to protect petitioners from irreparable harm.

Indian courts should be more willing to follow a two-track remedial approach that combines both individual and systemic constitutional remedies. This can help ensure that public interest litigation does not lose its way and become unmoored from the human suffering that constitutional violations cause to specific individuals and groups. Awarding remedies for aggrieved individuals such as damages and habeas corpus plays to judicial strengths and the principle that in democracies that respect the rule of law, there should be remedies for constitutional violations. Individual remedies for past or ongoing violations can produce some remedial success, increase confidence in the judiciary and provide tangible examples of the results and consequences of governmental neglect of constitutional rights.

But individual remedies will not be enough. They can become a kind of tax on constitutional violations if the same constitutional violations are allowed to occur again and again. There is a need for systemic remedies in the age of bureaucratic state as recognised by Abram Chayes fifty years ago . Indian courts should not abandon public law litigation to vindicate the human rights of the disadvantaged including prisoners. Courts have constitutionally protected powers to require the executive and the legislature to respond to their decisions. If these responses are not reasonable or forthcoming, courts may have no choice but to order more intense and intrusive systemic remedies and

individual remedies to repair past and ongoing constitutional violations. Combining individual and systemic remedies provides a means to register inevitable remedial failures and to begin another, and hopefully more successful, cycle of remedies.