PUBLIC LAW LITIGATION IN THE U.S. AND IN ARGENTINA: LESSONS FROM A COMPARATIVE STUDY

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I. INTRODUCTION

The Judiciary may follow one of two distinguished paths in promoting social change in countries equipped with strong-form judicial review.[1]

First, within the framework of traditional judicial review, the Judiciary may declare a law unconstitutional, establish a precedent, and expect compliance with it in subsequent cases. This is usually accompanied by an award of damages, or some kind of individual redress.

On the other hand, the recognition of economic, social and cultural rights as fundamental rights points to increasingly frequent cases in which the Judiciary abandons a passive stance. In addition to enforcing a right, it finds it must assume an active political role, urging the public authorities to adopt a specific course of action or taking upon itself the management of a specific social conflict. Where a violation of fundamental rights is due to the defective operation of a bureaucratic organization, such constitutional violation "cannot adequately be redressed through monetary compensation."[2] Therefore, the "need to fulfill the court's remedial duty justifies the use of structural injunctions to remedy public law violations"[3] in which the aim is to "restructure public agencies"[4] and to give "meaning to our constitutional values in the operation of these organizations."[5]

In the United States, the device used by the Judiciary to perform this managerial role has been the structural injunction, issued within the sphere of what is known as "Public Law Litigation." It is a device whereby the court not only strikes down a statute or a public policy as unconstitutional but also retains jurisdiction and seeks to enforce the judgment within the framework of a "polycentric"[6] conflict. Understanding that conflicts regarding groups or collective rights are ultimately decided in the day-to-day operation of these bureaucracies, the focus of court action is on the future remedy rather than on the enforcement of rights in individual cases.

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[1] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 33 (2008) (defining "strong-form judicial review" as a system in which judicial interpretations of the Constitution are final and unrevisable by ordinary legislative majorities).

[2] Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1357, 1378 (1991).

[3] *Id.* at 1379.

[4] Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016 (2004).

[5] Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

[6] *See* Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978) (defining "polycentric" conflicts as those with complex and interacting points of influence that can only be resolved by managerial direction or contract).

In recent years, several countries have regarded the American experience in this field as a path to follow.[7] Thus, courts in countries like Argentina have adopted an activist approach relying on the prestige of the U.S. Supreme Court. However, the actual impact and results of judicially driven reforms are still under debate.

These facts offer us the opportunity to contrast the experiences in both countries to answer a basic question: what are the conditions under which Public Law Litigation is effective?

The aim of this Article is to answer that question using the comparative method. We first seek to describe Public Law Litigation and the use of structural remedies in the United States and in Argentina, aligning similarities, linkages, and differences. Then, the insight gathered will allow us to identify a set of generally valid principles and standards for the effective implementation of these complex procedural devices.

To accomplish these goals, the analysis has been organized as follows:

Part II reviews the experience of Public Law Litigation in the United States and examines some lessons to be learned from its case law.

Part III argues that it is possible and useful to draw a comparison between the American and Argentine legal experiences, establishing the relevant contact points. Then, it describes the cases in which the Supreme Court of Argentina has used structural remedies in the context of Public Law Litigation.

Based on this comparative analysis, Part IV identifies and describes the political conditions and technical requirements needed to obtain effective results. This schematic description makes up a model that may prove useful to assess and guide this controversial driver of social change.

Finally, Part V states the general conclusions that may be drawn from this study.

II. PUBLIC LAW LITIGATION IN THE UNITED STATES

Public Law Litigation and structural remedies were born in the United States within the framework of the civil rights cases of the mid-twentieth century. This was the area in which "most courts gained their familiarity with public law litigation," and these cases "shaped how federal courts would cope with public law litigation generally."[8]

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[7] *See* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 235–37 (2012).

[8] Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 222 (2000).

Therefore, we will now focus on the most important milestones in the use of structural remedies in the field of racial desegregation of public schools, and will then make some specific comments concerning the area of prison reform. Naturally, it is impossible to provide an exhaustive account of all of the cases relevant in this regard, so we will consider only those that are the most meaningful for the purpose of this Article.

A. Racial Desegregation in Schools

Apart from some prior use in specific cases, the rise and definitive establishment of Public Law Litigation came with the racial desegregation process in public schools following *Brown v. Board of Education*[9] and its progeny. This case is no doubt paradigmatic and a key to understanding the subsequent development of structural remedies in different areas of the law.[10] This holds true not only for the United States but also for many other countries, including Argentina, as *Brown* came to exemplify globally "the possibility that lawyers could structure and execute a litigation strategy designed to produce substantial changes in the law."[11]

Still, while *Brown* is one of the most celebrated cases for its profound moral significance, the specific procedural measures adopted to implement such strategy, and the use of structural remedies by the courts over the years, have also met with heavy criticism.

As is well-known, this famous decision of the Supreme Court came in the wake of a long judicial strategy pursued by the National Association for the Advancement of Colored People (NAACP), which adopted this course of action on numerous fronts of interest to the African-American population. The Supreme Court's holding that *de jure* segregation violated the Fourteenth Amendment extended to all public educational institutions. It affected the legislation of twenty-one states that required or expressly permitted a segregated educational system at the state level under the "separate-but-equal" doctrine.[12] This doctrine was expressly repealed in *Brown*, in which it was concluded that "separate educational facilities are

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[9] 347 U.S. 483 (1954).

[10] *See* Mark Tushnet, *Public Law Litigation and the Ambiguities of* Brown, 61 FORDHAM L. REV. 23 (1992). *Accord* Appel, *supra* note 8, at 222; Fiss, *supra* note 5, at 2; Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1390 (2000).

[11] Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1693 (2004).

[12] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

inherently unequal."[13] The ruling was a typical declaration of unconstitutionality, with immediate legal effects.

But, as the decision did not explicitly include any kind of "remedy" or practical consequence, the ruling was anything but complied with, and the Supreme Court had to issue a new decision to define how to carry out the enforcement duties.

It took one more year to address the issue, and still nothing significant was decided. In the case known as *Brown II*, the Supreme Court ruled that, in view of local peculiarities, the trial courts in each jurisdiction had to deal with this issue; such trial courts were to issue judgments urging public schools to admit students under a non-discrimination standard "with all deliberate speed."[14] In a way, the Supreme Court extricated itself from the problem of implementation and "delegated the reconstructive task to the lower federal judges."[15]

The stage beginning at this point was marked by the lone efforts of the lower courts, indifference from the other branches of the federal government, and stiff opposition by parts of the local governments in the southern states. From 1955 to 1964, the federal lower courts engaged in intense, wide-ranging activity, while the Supreme Court issued at least three decisions in which it emphatically insisted on steering the course originally set.[16] However, in 1963, nine years after *Brown I*, resistance to change was still substantial; the results were not as expected, and at least two attempts to eschew the desegregation order needed to be halted by a ruling of unconstitutionality.

Thus, in the period spanning from 1954 to 1964, the Supreme Court and the lower courts deployed considerable efforts to achieve racial desegregation in schools and the operation of a "unitary" system. But theirs was a single-handed endeavor, unaided by the otherwise decisive support of the other branches of the federal government. As Rosenberg notes, during this decade of intense judicial activity, "virtually nothing happened."[17]

The situation changed only in 1964. Unlike the prior stage, this year saw a great deal of activity in Congress and the Executive. As indicated by Rosenberg, it was only in 1964 that a Civil Rights Act was enacted that actually had a significant impact and entailed the decisive support of the

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[13] *Brown*, 347 U.S. at 495.

[14] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

[15] Fiss, *supra* note 5, at 3.

[16] Griffin v. County School Bd., 377 U.S. 218 (1964); Goss v. Bd. of Educ., 373 U.S. 683 (1963); Cooper v. Aaron, 358 U.S. 1 (1958).

[17] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008).

political branches of the federal government.[18] The Attorney General was once again authorized to bring actions on behalf of affected individuals, and it became possible to deny federal funds to school districts engaged in racial discrimination. In comparison with this initiative positively involving the political branches of government, the actions of the Judiciary "appear irrelevant."[19]

As far as the judicial sphere is concerned, from 1964 to 1968 the Supreme Court did not render any significant decisions. But in 1968 its work gathered steam, and in *Green v. Board of New Kent County* it issued the first judgment in which the Supreme Court itself defined standards and factors to determine whether a desegregation plan was constitutionally acceptable. Later, in 1969, the Supreme Court decided *Alexander v. Holmes County*, in which it stated that the time to act under the "with all deliberate speed" standard had run out and schools must desegregate immediately.[20]

With a Judiciary acting in full exercise of its authority, accompanied by decisive action on the part of the political branches of the federal government and with the support of a majority of public opinion, tangible results began to emerge. Resistance waned, and local authorities gradually complied with judicial remedies.[21]

At this point, an initial stage came to a close and another one started in which the courts were confronted with the much harder problem of segregation in urban areas. In rural districts, which only had one or two schools, the issue was not particularly challenging. By contrast, urban areas with hundreds of schools revealed that "although *Brown* succeeded in eliminating *de jure* segregation, it fell short of eliminating *de facto* segregation."[22]

Faced with this reality, the courts sought to use a different type of intervention and began to employ more ambitious remedies, such as "busing." This remedy consisted of a court-ordered, mandatory public transportation program aimed at ensuring racial integration in terms of proportional representation within a specific school district. The program

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[18] *Id.* at 49–54.

[19] *Id.* at 52; *accord* Michael J. Klarman, *Unfinished Business: Racial Equality*, *in* AMERICAN HISTORY 213–19 (2007); Martin R. West & Joshua M. Dunn, *The Supreme Court as School Board Revisited*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 3, 7 (Joshua M. Dunn & Martin R. West eds., 2009).

[20] Green v. Bd. of New Kent Cnty., 391 U.S. 430 (1968); Alexander v. Holmes Cnty., 396 U.S. 19 (1969).

[21] *See* ROSENBERG, *supra* note 17, at 52–53.

[22] Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2421 (2004).

included the transportation of children to places somewhat distant from their homes in order to reverse the underlying trend that a particular ethnic group prevailed in certain neighborhoods. This new approach was upheld by the Supreme Court in *Green*[23] and *Swann*.[24]

It is clear that the courts went from a minimalist and incremental approach to a maximalist approach geared toward resolving not only the immediate constitutional controversy but also an underlying social conflict. In the case of racial segregation, the courts were not content with banning *de jure* discrimination; rather, they also sought to shift demographic patterns, internal migrations, school budgets, relative income, etc. The court system thus firmly focused on coping with a conflict that was polycentric in nature by using a set of far-reaching structural remedies that were designed as rights by the Judiciary and, as a result, not afforded much flexibility.

This approach met with resistance, social protest, and the reaction of certain communities that felt invaded by federal policy.[25] In this specific case, a process began to develop that sociologist James S. Coleman has defined as "white flight,"[26] defined as the large-scale migration to school districts that were not affected by the busing policy or going over to the private school system. Given the underlying conditions that were the product of different income patterns, the intervention of the courts paradoxically created an unwanted incentive to the development of an educational system for the rich. It has been argued in this regard that busing was a decisive factor in demographic and migration trends.[27]

In an effort to address the white flight problem, some courts responded by adopting a more expansive stance: they extended the mandatory transportation order to neighboring districts, thus forcing children to travel increasingly longer distances from their homes. But in deciding *Milliken*,[28] the Supreme Court ruled that the busing policy was not to apply to children in communities with no record of *de jure* racial segregation.

Therefore, the scant flexibility of the scheme, supported by unilateral judicial decisions endowed with the aura of enforcing constitutional rights,

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[23] 391 U.S. 430 (1968).

[24] 402 U.S. 1 (1971).

[25] *See* LUCAS A. POWE, THE SUPREME COURT AND THE AMERICAN ELITE 1789–2008, at 268–70 (2009); Susan Olzak et al., *School Desegregation, Interracial Exposure, and Antibusing Activity in Contemporary Urban America*, 100 AM. J. SOC. 196, 232 (1994).

[26] *See generally* JAMES S. COLEMAN ET AL., TRENDS IN SCHOOL SEGREGATION 1968–73 (1975).

[27] *See* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 170–76 (1996).

[28] Milliken v. Bradley, 418 U.S. 717 (1974).

led in many places to an exodus from public schools, as well as to their gradual impoverishment, stigmatization and more acute racial segregation than before the implementation of the remedies.

Finally, in 1991, the Supreme Court helmed by Chief Justice Rehnquist decided in *Dowell*[29] that schools could not remain indefinitely under judicial supervision and that it was time to return control to the local authorities in order for them to find suitable and flexible policies to accommodate each need. By then, there were more than 800 school districts under judicial supervision. Additionally, in deciding *Freeman v. Pitts* in 1992, the Supreme Court put an end to judicial maximalism, holding that private actions cannot be judged under constitutional standards and that it was "beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts."[30] Within this context, there are studies showing that racial resegregation has been a well-entrenched trend since the early 1980s.[31] On the strength of this evidence, several authors maintain that unilateral, top-down remedies like busing have failed.[32]

What followed during the 1990s was a gradual decline in the use of structural remedies within the framework of racial desegregation in schools.[33] The courts began to focus on how and when to terminate judicial intervention in public school management.[34] Evidence revealed a picture that was "far from pretty, further complicating *Brown*'s legacy, and serving as yet another reminder of the limits of well-intentioned efforts to improve educational practice, policy, and results through litigation."[35] Hence the many voices that express criticism at the managerial role of the courts in the quest for educational reform.

While there is no question about the efficacy of *Brown* in terminating *de jure* segregation, the subsequent judicial intervention had rights and wrongs,

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[29] Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).

[30] Freeman v. Pitts, 503 U.S. 467 (1992).

[31] *See* GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* (1997).

[32] *See, e.g.*, ARMOR, *supra* note 27; CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING (1991); Daniel Kiel, *Exploded Dream: Desegregation in the Memphis City Schools*, 26 LAW & INEQ. 261 (2008).

[33] Bradley W. Joondeph, *Skepticism and School Desegregation*, 76 WASH. U. L.Q. 161, 161 (1998); Dennis Schapiro, *Looking for Justice in All the Wrong Places: Reflections on the End of the School Desegregation Era*, 17 HAMLINE J. PUB. L. & POL'Y 323, 323 (1996).

[34] Michael , *Assessing the Efficacy of School Desegregation*, 46 SYRACUSE L. REV. 1093, 1096 (1996); Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 759 (1993).

[35] Heise, *supra* note 22, at 2419.

leading to mixed results or to results that were paradoxically detrimental to those groups that the courts purported to benefit. Most authors conclude today that "before Congress and the executive branch acted, courts had virtually no direct effect"[36] and that "the courtroom is rarely the optimal venue for education policymaking."[37]

Furthermore, over the long term, social reaction to unilateral, mandatory, and hardly flexible judicial intervention has stoked resistance moves that have delayed ongoing integration processes. In some cases, this even prompted the contention that "gradual resegregation, already in progress even in 'successfully' desegregated districts, will likely persist," which is why "*Brown*'s legacy in this context is aptly characterized as one of unfulfilled promise."[38]

B. Prison Reform

Mark Tushnet explains that after "gaining experience in supervising important bureaucratic institutions in the school setting, the lower courts began extending their supervision to other institutions similarly regulated by the Constitution."[39] Thus, as soon as the issue of prison conditions raised some interest among public opinion, the Judiciary embarked on a reform of the system with the tools developed in the area of racial desegregation in schools.

Two circumstances converged in the United States in the second half of the twentieth century that would be key to provoking a change in the role of the Judiciary in this field.

On the one hand, from a sociological standpoint, there was an exponential increase in prison population beginning in the mid-twentieth century,[40] which brought with it escalating problems of overcrowding, corruption, ill-treatment, or violence in prisons. The plight gained public visibility with the riots of the late 1950s, and thus found its place on the civil rights agenda that was then gathering momentum.

On the other hand, on the strictly judicial front, the Warren Court began to identify inmates as one of the "discrete and insular minorities"[41] deserving

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[36] ROSENBERG, *supra* note 17, at 70.

[37] West & Dunn, *supra* note 19, at 4.

[38] Heise, *supra* note 22, at 2419; *see also* CHARLES J. OGLETREE JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2005) (arguing that *Brown* failed to effectively promote integration).

[39] Tushnet, *supra* note 10, at 25.

[40] Peter Finn, *Judicial Responses to Prison Crowding*, 67 JUDICATURE 318, 319 (1984).

[41] 304 U.S. 144, 152 n.4 (1938).

the protection of the federal courts. Additionally, the enforcement of the Cruel and Unusual Punishment Clause led to the slow abandonment of the "hands-off" policy that prevented federal interference in state penal conflicts, first clearly stated in 1866 in *Pervear v. Massachusetts*.[42] Driven by the judicial victories of the NAACP, and with the support of a radical change in public opinion and in that of political leaders at the federal level, the Judiciary began to adopt structural injunctions to reform the prison system.

Change unfolded in stages. In cases like *Trop v. Dulles*,[43] the Supreme Court said that there were "evolving standards of decency" that necessarily influenced the interpretation of the Eighth Amendment. Subsequently, in *Robinson v. California*,[44] the Supreme Court extended this federal constitutional clause to the states, holding unconstitutional a California State law for violation of the Eighth Amendment's protection against cruel and unusual punishment. In *Jones v. Cunningham*,[45] the Supreme Court admitted that inmates subject to state jurisdiction had the right to file a writ of habeas corpus challenging the conditions of their imprisonment as well as its legality under Federal Constitution standards.[46] Finally, in *Cooper v. Pate*,[47] it ruled that state prison inmates have standing to sue in federal court under the Civil Rights Act of 1871.[48]

From then on, there was a proliferation of class actions and collective lawsuits. The "hands-off" judicial tenet was abolished forever.[49] The federal courts were allowed to interfere and urged to attempt a full transformation of state prisons.[50] It was within this legal framework that decisions provided for large-scale structural reforms.

A myriad of cases should be cited if a complete historical review were to be attempted of the developments in this area of judicial intervention during the 1970s. For the sake of brevity, only the most significant are discussed. Common to all of them is that they entailed massive intervention in the prison system and the establishment by the Judiciary of extensive plans, formulated down to the smallest detail, setting out guidelines for the management of prison facilities.

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[42] 72 U.S. 475 (1866).
[43] 356 U.S. 86, 101 (1958).
[44] 370 U.S. 660 (1962).
[45] 371 U.S. 236 (1963).
[46] *Id.* at 236–43.
[47] 378 U.S. 546 (1964).
[48] GEORGE F. COLE ET AL., THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 534 (2014).
[49] *Id.*
[50] Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558–64 (2006).

In the 1969 case, *Holt v. Sarver*,[51] the Supreme Court declared several aspects of Arkansas' prison system unconstitutional. Injunctive relief was ordered in subsequent decisions including the obligation to establish guidelines to follow for correcting the problems; a court ordered administrators to report on the progress of the implementation of these guidelines and, later, directed the State Correction Board to devise a plan of action.[52] From this point onwards, the courts began to weigh the "cumulative effect" of conditions of confinement by prisoners as a test for establishing a possible constitutional violation.[53]

Along the same lines, mention should be made of the landmark ruling in *Pugh v. Locke*,[54] a case deriving from a class action filed by Alabama prison inmates. In an appendix to its decision, the District Court instituted the "Minimum Constitutional Standards for Inmates of Alabama Penal System," consisting of a detailed prison management plan to be supervised by a Human Rights Committee for the Alabama Prison System.[55] As a result, the administrative authorities of the Alabama Board of Corrections became subject to the court's supervision.[56]

Last, particularly noteworthy is *Ruiz v. Estelle*,[57] decided by a Texas federal court. This case provides the most telling example of how far judicial intervention went in regulating conditions of prison incarceration. Again, an individual petition led to a class action alleging that overcrowding, lack of access to health care, and abusive security practices were a violation of the U.S. Constitution.[58] The legacy was more than a decade of litigation in the form of consent decrees, appeals, and other legal actions, and despite a certain amount of progress, compliance problems recurred.[59]

We now approach the last stage in this path charted by the courts—a phase marked by a state of virtual saturation, legislative reaction calculated to curb the expansion of judicial intervention, and, in the end, progressive disengagement. The early 1990s showed that the courts were, for all practical purposes, in charge of managing prison facilities and that "virtually

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[51] 300 F. Supp. 825 (E.D. Ark. 1969).

[52] *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 59–66 (2000).

[53] L. Lee Boatright, Note, *Federal Courts and State Prison Reform: A Formula for Large Scale Federal Intervention into State Affairs*, 14 SUFFOLK U. L. REV. 545, 547 (1980).

[54] 406 F. Supp. 318 (M.D. Ala. 1976).

[55] *Id.* at 332–37.

[56] *Id.* at 331.

[57] 503 F. Supp. 1265 (S.D. Tex. 1980).

[58] *Id.* at 1275–76.

[59] *See* BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS 226–38 (2010).

every facet of institutional life has been constitutionalized in ways that directly affect prisons and jails in all fifty states."[60]

As the system matured, orders were no longer issued unilaterally, top-down from the courts. Judicial intervention evolved into consent decrees drafted within multilateral negotiation processes involving administrative authorities and class action representatives. In all cases, this meant that jurisdiction was retained over long periods, which was "frequently accompanied by an increase in supervision" and the use of "contempt citations"[61] to enforce inflexible plans. Moreover, the courts delegated their authority and relied especially on the support of special masters, who "are able to oversee the daily operation of prisons and administer the details of court orders after the case is decided."[62]

Over time, opinion of both the public and the federal government shifted. Both shifts pointed to the counterproductive effects of judicial intervention. The increased expense necessarily entailed by an improvement of conditions in prison facilities was to blame for the unavailability of funds necessary to build new prisons or improve other aspects of crime prevention policies. Also, public opinion began to turn its attention to the large number of frivolous claims. The attendant clogging of the courts and administrative overload became apparent. At the same time, a number of studies "suggested that judicial intervention resulted in increased violence in prison,"[63] as a consequence of the "diminishing authority of correctional officers"[64] and, in general, of the "climate of uncertainty and disruption of the prison administration autonomy,"[65] all of which had an impact on the increase in the crime rate.[66]

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[60] Malcolm M. Feeley & Roger A. Handson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and Review of the Literature*, *in* COURTS, CORRECTIONS AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 13 (John J. Di lulio ed., 1990); *accord* STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM 95 (2002).

[61] BRADLEY S. CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS 55 (1991).

[62] POWERS & ROTHMAN, *supra* note 60, at 98.

[63] *Id.* at 100.

[64] *Id*.; *see also* LARRY E. SULLIVAN, THE PRISON REFORM MOVEMENT: FORLORN HOPE 92 (1990); Kathleen Engel & Stanley Rothman, *Prison Violence and the Paradox of Reform*, 73 PUB. INT. 91, 91–105 (1983).

[65] POWERS & ROTHMAN, *supra* note 60, at 101.

[66] ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 187 (2003).

Two courses of action aimed at reversing this situation are worthy of note. First, in *Rufo v. Inmates of Suffolk County Jail*,[67] the Supreme Court sought to set parameters allowing for consent decrees to be more flexible and easy to modify. Within this context, it also held that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations, but they are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification."[68]

Second, a turn in public opinion and political support surfaced as Congress passed the Prison Litigation Reform Act (PLRA)[69] of 1996. The goal was to decrease the incidence of litigation within the management of prison conditions. Among other things, it provided that a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[70] "Automatic stay" and "exhaustion" mechanisms were also introduced as a way of limiting access to the courts.[71]

These factors, added to an increasing conservatism of the federal bench. Doctrinal innovations of the mid-1990s restricting injunctive remedies and declining funding for inmates' advocates[72] account for the downward trend in this field.

C. Overall Assessment

The cases involving issues of racial desegregation in schools and of prison reform are the examples of Public Law Litigation that have grabbed most of the attention. Similar patterns, drawn along comparable lines, can be observed in environmental law cases and in the reform of mental health institutions. Leaving aside certain ideological stances, today's U.S. legal literature shows that structural injunctions have, at best, a limited impact[73] and may cause paradoxical or counterproductive effects.

As far as desegregation in schools is concerned, evidence suggests that a model of unilateral judicial intervention providing for mandatory plans

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[67] 502 U.S. 367 (1992).
[68] *Id.* at 392.
[69] Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to 1321-77 (1996).
[70] 18 U.S.C. § 3626(a)(1)(A) (2000).
[71] *Id.*
[72] Schlanger, *supra* note 50, at 590.
[73] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 340–42 (1996); SANDLER & SCHOENBROD, *supra* note 66, at 6.

sought to be applied against the active resistance of the political powers or large sections of public opinion is usually ineffective. It might be argued that this kind of intervention can be justified on the grounds that it is instrumental in placing the issue on the public agenda, thus fostering debate and the development of solutions.[74] While this political impact is impossible to measure, critical authors claim that its downside effects include the demobilization of interest groups,[75] the misapplication of scarce financial and human resources,[76] and the ensuing possibility that politicians will shy away from the underlying conflict, which thus becomes the sole responsibility of the courts.[77]

This is why, even when it comes to bringing these conflicts onto the political arena, the overall assessment may also prove to be negative. Specifically, scholars have highlighted the delaying effect of the judicial strategy in the realm of racial integration[78] apparently stemming from the fact that "the black community's belief in the efficacy of litigation inhibited the development of techniques involving popular participation and control."[79]

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[74] *See, e.g.*, Klarman, *supra* note 19 (explaining the "agenda-setting" effect of *Brown*, although mentioning that opinion on race was educated far more by the civil rights movement than by litigation); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) (arguing that sometimes litigation can be a catalyst for social movements).

[75] Authors enrolled in the Critical Legal Studies movement consider that the litigation strategy is ineffective in achieving its objectives, counterproductive, and conservative in reinforcing structures of subordination. *See, e.g.*, MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM (1986); Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1132–45 (1997).

[76] Klarman, *supra* note 19, at 219 (claiming that after *Brown*, litigation and direct action competed for scarce resources).

[77] *See, e.g.*, ROSENBERG, *supra* note 17, at 102; SANDLER & SCHOENBROD, *supra* note 66, at 139; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 173 (1999).

[78] *See, e.g.*, ROSENBERG, *supra* note 17, at 156; Kiel, *supra* note 32, at 261 (arguing that the use of structural remedies such as busing served as a "death knell" for effective integration); Gerald N. Rosenberg, Brown*, Is Dead! Long Live* Brown*!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994). *But see* Michael J. Klarman, Brown*, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (arguing that *Brown* indirectly accelerated the pace of racial change by crystallizing southern white resistance, which in turn led to violent confrontation and then national intervention in the form of civil rights legislation).

[79] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 514 (1976).

A review of the results in the area of prison reform invites a similar conclusion. Although it is perceived as one of the few areas in which the courts have been "relatively successful,"[80] it is not clear that any such success was necessarily a product of judicial intervention. Some studies indicate that most prison construction is not in response to lawsuits, and that after more than a decade of litigation, prison overcrowding continued to be a problem.[81]

At the same time, similarly to desegregation in schools, unilateral and inflexible models led to resistance and counterproductive effects. As noted above, judicial intervention proved ineffective in securing budgetary resources,[82] and it led to diminished authority slackening in prisons[83] and to increased violence among inmates,[84] and in some cases, to a rise in the crime rate.[85] As happened with the educational reform, public opinion has eventually turned its back on this kind of approach.[86]

Still, all of the cases examined above have some positive points from which helpful conclusions may be drawn to formulate principles for a productive use of structural remedies.

In general, present-day authors suggest that judicially-driven reforms are advisable only in those cases in which the legal and political system allows for the implementation of a "multilateral"[87] or "experimentalist"[88] model in which the court operates more as a "power broker"[89] or "negotiator"[90] than as

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[80] Malcolm M. Feeley, *Implementing Court Orders in the United States: Judges as Executives*, *in* JUDICIAL REVIEW AND BUREAUCRATIC IMPACT 221, 223 (Marc Herthog & Simon Halliday eds., 2004); *accord* POWERS & ROTHMAN, *supra* note 60, at 108.

[81] *See* Peter M. Koneazny & Karl D. Schwartz, *Preface to The Colloquium: The Prison Overcrowding Crisis*, 12 N.Y.U. REV. L. & SOC. CHANGE 1 (1984).

[82] Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 775 (1992).

[83] POWERS & ROTHMAN, *supra* note 60, at 111.

[84] *See id.* at 96; ROSENBERG, *supra* note 17, at 307; James W. Marquart & Ben M. Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 19 LAW & SOC'Y REV. 557, 575 (1985).

[85] SANDLER & SCHOENBROD, *supra* note 66, at 187.

[86] *See* Schlanger, *supra* note 50, at 571.

[87] David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1021 (2004) (dividing commentators on institutional reform litigation into "unilateralists" who focus on judges and "multilateralists" who look at other participants as well).

[88] Sabel & Simon, *supra* note 4, at 1016.

[89] *See, e.g.*, ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530 (1987); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 77–88 (1979).

the fount of public policies. This conception entails open rules of procedure, molding the litigation proceeding into a participatory setting—a forum in which the parties involved may be at liberty to agree on the steps to be taken to achieve reform. The cornerstone of this approach is, therefore, the ability of the courts to promote the engagement of political authorities and class representatives, such that coordinated efforts may result in a sustainable impact in the long term.

Beyond this multilateral model—inherently difficult to carry out in practice—the review of Public Law Litigation and the use of structural remedies in the United States lays bare that these types of devices have lost momentum, are past their climax, and, in most cases, fall short of expectations. This explains why the overall picture today reveals that " 'structural injunctions' have receded from the remedial scene."[91]

III. PUBLIC LAW LITIGATION IN ARGENTINA

A. The Case of Argentina: Why it is Relevant

For purposes of this comparative study, an analysis of the situation in Argentina has several interesting sides to it. First, Argentina is one of the few countries in the region with both a vast catalog of social, economic, and cultural rights afforded constitutional rank and a model of strong-form judicial review[92] almost identical to that in the United States.

Moreover, "structural injunction-like devices have been rare in comparative constitutional law,"[93] and within this context, Argentina appears as "one of the few countries that has actually attempted structural remedies."[94] This peculiarity can be accounted for by the recent adoption of a model of an activist Supreme Court, which seeks to gain legitimacy before

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[90] *See* R. Shep Melnick, *Taking Remedies Seriously: Can Courts Control Public Schools?*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION, *supra* note 19, at 17, 29; *accord* Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from* Antoine v. Winner School District, 54 N.Y.L. SCH. L. REV. 955, 961–62 (2009/10); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2012 (1999); Sturm, *supra* note 2, at 1438.

[91] Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004); *accord* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143–44 (2003); Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 SAN DIEGO L. REV. 1617 (2004).

[92] *See* TUSHNET, *supra* note 1, at 33.

[93] Landau, *supra* note 7, at 235.

[94] *Id.* at 235 n.246.

public opinion and earn for itself a place in the political dynamics. Ricardo L. Lorenzetti, Chief Justice of the Supreme Court of Argentina, explains this legitimacy-seeking strategy as follows:

> In a not very distant future, we hope to have a Judiciary that takes on and performs the role of cooperating in the large transformations needed in our country. And I say this because the judicial branches of government have historically been conceived as vehicles for preservation of the existing order; but in the last few years, much has been done in the realms of legal scholarship, jurisprudence, and all the areas in which we are usually involved toward seeing the Judiciary as an institutional player that is also engaged in the transformation of society and not merely in its preservation. And in this transformation of society, we have a most significant part to play. . . . In this regard, the Judiciary, together with the other branches of government, must operate as a driver of institutional transformation by means of judicial and institutional decisions alike. . . . This is thus the role that we envision for the Judiciary: an active participant role in the public agenda of fundamental civic issues, oriented toward transformation and allowing for participation in major government decisions.[95]

Second, Argentina provides an apposite case for a comparative study in view of the profound influence that American constitutional law has historically had there. Following the constitutional conventions of 1853 and 1860, Argentina promulgated its first formal constitution patterned primarily on American constitutional thought. Although the Argentine constitutional process drew on other specific influences, it remains true that the design of the fundamental structure of the Argentine Constitution was guided by the letter and the spirit of the U.S. Constitution.[96] As stated by José Benjamín Gorostiaga, intellectual leader of the 1853 Constitutional Convention, the

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[95] *See* Ricardo L. Lorenzetti, C.J., Sup. Ct. of Argentina, Opening Speech for the Judicial Year 2011 (Feb. 22, 2011), *available at* http://www.youtube.com/watch?v=1D6P9ApajUc.

[96] *See, e.g.*, MANUEL J. GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL (2006). *But see* RODOLFO RIVAROLA, LA CONSTITUCIÓN ARGENTINA Y SUS PRINCIPIOS DE ÉTICA POLÍTICA (1944) (criticizing the opinion that the Argentine Constitution is merely a copy of the U.S. Constitution and may be fairly interpreted by applying U.S. precedents).

Argentine Constitution was "cast in the mold of the Constitution of the United States."[97]

Despite obvious historical and cultural differences between both countries, Argentina followed the U.S. Constitution in laying the groundwork for its organization. Thus, Argentina adopted a written Constitution providing for a federal government, presidentialist in form, with a system of separated and coordinated powers that exercise reciprocal checks and balances, and limited by a bill of rights. In addition, expressly citing *Marbury v. Madison*,[98] the Supreme Court of Argentina espoused strong-form judicial review, as theretofore exercised by its counterpart in the United States.[99] Consequently, to the extent that there are fundamental constituent elements common to both countries and that the Supreme Court of Argentina continues to be strongly influenced by its American counterpart, it may be asserted that a comparison of both legal systems is pertinent and there are lessons to be drawn from one system for consideration in the other.

There is, however, an obvious distinguishing trait of particular significance to the issues under consideration. Argentina is a civil law country while the structural remedies granted within the framework of Public Law Litigation may be seen as a logical and foreseeable development of the social rulemaking function traditionally associated with the role of common law judges.[100]

In this regard, it has been stated that the various players within the common law system accept "that one of the hallmarks of public law litigation is that it will generate norms that govern people not parties to the litigation,"[101] meaning that it is accepted from both a legal and a political standpoint that litigation can have "important consequences for many persons including absentees."[102] Naturally, this approach defines both the way in which judges and lawyers understand that their work should be done and the expectations held by society in this regard.

This difference is not confined to the sphere of judicial culture, but rather takes a concrete form in certain characteristics of the law of procedure, such

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[97] 4 EMILIO RAVIGNIANI, ASAMBLEAS CONSTITUYENTES ARGENTINAS 468 (1939).

[98] 5 U.S. 137 (1803).

[99] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/9/1887, "Sojo v. Cámara de Diputados," Fallos (1887-32-120) (Arg.).

[100] Fiss, *supra* note 5, at 36 (arguing that the function of courts under the common law was paradigmatically not dispute resolution, but to give meaning to public values through the enforcement and creation of public norms).

[101] Appel, *supra* note 8, at 221.

[102] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

as the regulation of class actions and the existence of equitable jurisdiction (which gives rise to the remedies known generically as equitable relief and, as a part thereof, the widespread category of injunctions). As noted by Argentine scholars, "the strong legalistic and administrative-leaning tradition of continental European law, which has influenced Argentine law to such a large degree, departs, to our detriment, from the generous intervention of common law judges in shaping the operation of class actions."[103]

It follows that a comparative analysis and the development of a set of practical rules aimed at establishing when and under what factual and legal circumstances structural remedies can be effective should only be undertaken with the understanding that any difficulties or limitations that may have been encountered in the United States in this field are coupled by the challenges posed by a law of procedure typical of a civil law system and a legal culture flowing from the continental European tradition.

B. Institutional Alternatives

When faced with a polycentric conflict in which the broad catalog of fundamental rights embraced by the Constitution may become subject to judicial review and enforcement of the judgment should be mediated through government agencies, the Argentine Judiciary can choose from a wide variety of options.

A first alternative available to the Argentine courts, just like to their counterparts in the United States, consists of making use of some of "passive virtues"[104] and avoiding or postponing a final judgment in the hope that the conflict will be better resolved on the political front. The Supreme Court of Argentina has followed the line of decisions adopted by the U.S. Supreme Court whereby constitutional review is limited to the existence of a justiciable "case or controversy."[105] As a result, the courts have leeway to act strategically and to rely on both procedural defects and substantive doctrines (such as those concerning political questions, legislative or administrative discretion, ripeness, mootness, and lack of standing) to avoid making rash decisions.

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[103] HUMBERTO QUIROGA LAVIÉ, EL AMPARO COLECTIVO 171 (1998).

[104] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (2d ed. 1986).

[105] Despite the current trend toward eliminating formal barriers for access to the courts, there are still numerous examples of the traditional view in present-day case law. *See*, *e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Compañía de Transmisión del Mercosur," Fallos (2009-332-1433) (Arg.).

In addition, as the Argentine system is a federal system, the courts have the possibility of raising procedural issues to have the case removed to other jurisdictions.[106] Specifically in connection with social rights, the courts may, under certain circumstances, invoke the absence of adequate legal regulation,[107] the principle of "progressive realization,"[108] or a lack of budgetary resources.

A second alternative available to the courts is to issue a decision upholding the claim before them while ensuring that such decision will not impact directly on public policy or on the underlying social conditions. Decisions rendered on a case-by-case basis may thus sustain the complaints filed without probing into the deep causes of the source conflict.

Using this minimalist approach, the Argentine Supreme Court has issued favorable decisions and satisfied the specific claims asserted by individuals or groups who brought the complaint but without demanding any structural change in public policies or in the existing administrative dynamics. Within the framework of this second scheme, the Supreme Court is often very careful to underscore the singularity of the facts and circumstances of the case in order to prevent the decision from being only too readily relied upon and applied by other courts.[109]

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[106] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/3/2002, "Ramos v. Buenos Aires," (2002-325-396) (Arg.), the Supreme Court denied a petition for a food subsidy and a housing solution filed by a woman with eight children and in a state of extreme poverty. The Court ruled that the "*amparo*" expedited procedure was inappropriate, lack of proof, and that the primary obligation for food and housing support relies on the family, not the state. In addition, the Court said that these types of claims should be heard by local jurisdictions, and not federal courts.

[107] In "Ekmekdjian v. Sofovich," CSJN, Fallos (1992-315-1492), the Supreme Court ruled that human rights enshrined in international instruments are legally binding and should be presumed operative and directly enforceable, even without legislation at the national level. However, in "Quisberth Castro," CSJN, Fallos (2012-335-452), a case dealing with the right to adequate housing, the Supreme Court ruled that some rights have only "derivative" enforceability, meaning that is necessary to pass legislation at the national level before a claim could be filed in court.

[108] United Nations International Covenant on Economic, Social and Cultural Rights, art. 2, 993 U.N.T.S. 3, Dec. 16, 1966.

[109] A good example of this strategy is "Quisberth Castro," CSJN, Fallos (2012-335-452). In this case, the Supreme Court decided a case concerning the right to adequate housing in the City of Buenos Aires. Here, the Court avoided a general ruling on the constitutionality of the city's housing policy and, instead, decided the case on purely individual grounds, considering plaintiff's special situation of extreme vulnerability.

In other cases, the Supreme Court has expressly stated that it will not regard a certain judgment as a precedent applicable to other pending issues.[110]

In this scenario, it is usually the case that any benefit that the Supreme Court decides to accord does not typically consist of one created by the Court itself. Rather, the Supreme Court will act to restore existing benefits, which the political branches of government have previously regulated and are contemplated in the appropriate budget but which, for some reason, have been arbitrarily suspended or removed.[111]

Finally, a third institutional alternative available to the courts is to undertake the reform of existing public policies to remedy the underlying structural failures that account for a repeated violation of certain rights. In adopting this standpoint, which is truly innovative, the Argentine Supreme Court has taken two different approaches.

The first entails the use of what are known as exhortatory judgments. Here the Supreme Court rules a certain governmental omission unconstitutional and urges the public authorities to pass the laws and implement such policies to comply with constitutional mandates. A process of institutional dialogue thus begins. The Judiciary confines itself to setting the guidelines for future action by the political authorities[112] and awaits the initiative of the other branches of government.

The second approach, adopted by the Supreme Court in recent years, entails the most heightened, activist-driven form of intervention and consists

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[110] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/11/2007, "Badaro v. ANSES," (2007-330-4866) (Arg.). In this case, the Supreme Court expressly ruled that the decision would only apply to the particular case, and not to others in a similar situation.

[111] This situation is frequent in cases dealing with the right to health. In Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Asociación Benghalensis," (2000-323-1339) (Arg.), the Supreme Court ruled that the state should restore treatment and provision of medicine for patients with HIV/AIDS. In Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/10/2000, "Campodónico de Beviacqua,"(2000-323-3229) (Arg.), the Supreme Court decided that the state should restore benefits for patients with Kostman's disease, and in "Asociación de Esclerosis Múltiple de Salta," CSJN, Fallos (2003-326-4931), the Court ruled that the state could not legally interrupt ongoing treatments benefiting patients with multiple sclerosis.

[112] An example of this position is Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2006, "Badaro v. ANSES," (2006-329-3089) (Arg.). In this case, the Supreme Court urged Congress to establish a mechanism for the automatic adjustment of plaintiff's social pension. In Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/5/2007 "Rosza," (2007-330-2361) (Arg.), the Supreme Court urged Congress to enact within a year a new valid regime for the appointment of interim federal judges, setting guidelines that the new regulation should follow.

of the use of structural remedies. Particularly noteworthy are the decisions rendered in *Verbitsky*[113] and *Mendoza*.[114] These are two cases in which the Supreme Court attempted a far-reaching structural reform model with a managerial flavor, in an effort to reshape the dynamics underlying the violation of fundamental rights. In both cases, the Supreme Court explicitly invoked the experience in the United States to justify the introduction of judgment enforcement mechanisms allowing it to formulate and monitor plans for management and reform of the bureaucratic system held responsible for the constitutional breach.

C. Prison Reform: Verbitsky

Verbitsky is the first case in which the Supreme Court of Argentina attempted the adoption of structural remedies, expressly citing the experience in the United States in this field.[115] The case began when Horacio Verbitsky, a public figure with close links to the federal government,[116] and representative of the NGO *Centro de Estudios Legales y Sociales* (CELS), brought a corrective and collective habeas corpus action before the Court of Cassation of the Province of Buenos Aires. He invoked the defense of all persons deprived of their freedom in the Province of Buenos Aires, detained in police stations or overcrowded penal facilities.

As regards the merits of the case, the existence of an overloaded prison system in the Province of Buenos Aires was successfully established. CELS provided evidence of cases of overcrowding, promiscuity among inmates, lack of special facilities for minors, and cells in dreadful sanitary and health conditions.

As explained by the Chief Justice of the Supreme Court, the decision was made to review the case as "a structural case or structural reform lawsuit, in the language used in Anglo-Saxon legal literature, owing to its complexity and size."[117] In 2005 the Supreme Court ruled against the Province of Buenos Aires and imposed a number of enforcement measures aimed at

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[113] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Verbitsky, Horacio / Habeas Corpus," (2005-328-1146) (Arg.).

[114] Corte Suprema de Justicia de la Nación [CSJN], [National Supreme Court of Justice], 20/3/2007, "Mendoza, Beatriz v. Estado Nacional," (2007-330-1158) (Arg.).

[115] In *Verbitsky*, the Supreme Court of Argentina cites U.S. cases such as *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), and the work of LYNN S. BRANHAM, THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS (2002).

[116] *Cf. Hipoteca Invisible*, La Nación (Arg.) (Sept. 15, 2013).

[117] RICARDO L. LORENZETTI, JUSTICIA COLECTIVA 47 (2010).

modifying the then-existing prison conditions. Among such measures, it was ordered that the Supreme Court of the Province of Buenos Aires, acting through the competent lower courts, have the detention of minors and sick persons in police stations within the province brought to an end within a period of sixty days. Provincial courts were likewise directed to put an end to any worsening of detention conditions entailing cruel, inhumane, or degrading treatment. The Executive and the Legislature of the province were also urged to bring the province's legislation into line with the "United Nations Standard Minimum Rules for the Treatment of Prisoners" adopted by Law No. 24660.[118] The Supreme Court required that these basic guidelines should govern any detention or deprivation of freedom.

Most innovative in this case was the establishment of a methodology based on institutional dialogue and negotiation. An upside of the decision was the order directed to the Province of Buenos Aires to set up a "Dialogue Table" together with certain leading NGOs, with the attendant duty to report every sixty days on the progress made.[119] The agenda was quite open, to the extent that the judgment did not provide any detailed guidelines on key matters such as the specific characteristics of prison infrastructure or the definition of budgetary goals.

Regarding compliance with the Supreme Court's decision and its actual impact over time, there have been mixed results and varying degrees of consistency in meeting each of the points addressed in it. As far as the exhortation to reform the provincial legislation is concerned, it received strong political support and an immediate response from the provincial Legislature. For example, provincial Law No. 13449[120] was passed in 2006, introducing substantial amendments in the province's Code of Criminal Procedure in the area of pretrial detention and release from custody. Many other sets of provisions have since been enacted in this regard. Scholars specializing in this field note that the international guidelines cited by the Supreme Court merely state that pretrial detention should be "exceptional," which is not a clear enough standard to guide reform.[121] This explains why the rules enacted are not thoroughly appropriate and have encountered criticism.[122] Witnessing to this lack of satisfactory results is the fact that the

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[118] Law No. 24,660, July 16, 1996, [28436] B.O. 2 (Arg.).

[119] Corte Suprema de Justicia de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "Verbitsky, Horacio / Habeas Corpus," (2005-328-1146) (Arg.).

[120] Law No. 13449, Prov. of Buenos Aires, Mar. 14, 2006, [LXVI-B] A.D.L.A. 1804.

[121] Néstor P. Sagüés, *Las Sentencias Constitucionales Exhortativas ("Apelativas" o "Con Aviso") y su Recepción en Argentina*, L.L. (2005-F-1461, 1465-68).

[122] *See* Néstor P. Sagüés, *Las Sentencias Constitutionales Exhortativas*, 4 ESTUDIOS CONSTITUTIONALES 189 (2006).

total number of pretrial detainees in the Province of Buenos Aires only dropped slightly throughout the process, from 24,576 in 2005 to 19,605 in 2014.[123] After nine years of litigation, the percentage of pretrial detainees over the total amount of inmates is still above 60% without any significant change over the past four years.[124]

Another fact that shows a lack of results in this area is that the total number of inmates in the Province of Buenos Aires rose 33.2% from 2007 to 2014. As of 2014, this figure is at its peak over the last fifteen years,[125] and has led to a scenario in which twenty-nine of the fifty-six prison facilities are filled beyond capacity[126] with no serious infrastructure improvement under way.[127]

As for the Supreme Court's orders directed to eradicating the detention of minors and sick persons in police stations, the results are ambivalent. On the one hand, the province's Supreme Court itself held, based on a report from the Provincial "Memory Commission," that these types of detentions had been eradicated and were forbidden in the future, so it deemed the problem to be formally solved.[128] However, there are claims that this kind of illegal detention still occurs in the so-called "Transitory Centers,"[129] which would not suit the needs of minors. Moreover, this aspect of the decision has given rise to paradoxical, undesired effects, as there have been minors who have filed habeas corpus petitions requesting to be kept in overcrowded cells at police stations to avoid being transferred to facilities distant from their usual place of residence.[130]

In connection with the number of adult detainees in police stations, CELS reported that efforts to decrease it were successful at first: the number dropped from 6,055 in 2004, to 2,782 in 2007.[131] Nevertheless, limited engagement on the part of the province's public authorities to correct the

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[123] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, A CUATRO MESES DE LA EMERGENCIA EN SEGURIDAD EN LA PROVINCIA DE BUENOS AIRES 12 (2014), *available at* http://www.cels.org.ar/common/documentos/Emergencia%20seguridad%20PBA.pdf.

[124] *Id.*

[125] *Id.* at 11.

[126] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, DERECHOS HUMANOS EN ARGENTINA, INFORME 2012, at 203 (2012), *available at* http://www.cels.org.ar/common/documentos/Informe2012.pdf.

[127] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 123, at 20.

[128] Suprema Corte de Justicia de la Provincia de Buenos Aires [SCPBA] [Supreme Court of the Province of Buenos Aires], 19/12/2007, "Verbitsky, Horacioa s/hábeas corpus" (Arg.).

[129] Mariela Puga, *La Realizacion de Derechos en Casos Estructurales: Las Causas 'Verbitsky' y 'Mendoza*,*'* 148 REVISTA PENSAMIENTO PENAL 17 (2012).

[130] *Id.* at 16.

[131] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 126, at 195.

situation once and for all led to a marked reversal of this downward trend. In 2009 the number climbed to 4,552 detainees.[132] It has been claimed that this drop in police station detentions is artificial and has been achieved at the expense of worsening overall prison conditions.[133]

Against this backdrop, the Supreme Court itself urged the governor of the Province of Buenos Aires to remedy the situation, but the problem persisted. Although the official number declined to approximately 1,069 in 2011,[134] a recent report published by CELS has shown that by 2014 the real figure was above 3,000.[135] The cause of this major setback is explained because in May 2014 the governor launched a crime prevention plan in which long-term detentions in police stations were once again authorized,[136] openly defying the Supreme Court ruling. This plan has been legally challenged, but until now these suits were dismissed.[137]

As regards this last issue, linked to overall detention conditions, it has been noted that the most serious plight is not the deficit in cells or beds but the fact that violence continues to be part and parcel of the structure and culture of the prison system,[138] and has grown considerably in recent years.[139] Riots among inmates are a common occurrence, exacerbated by deplorable living conditions. This triggers episodes of harsh repression leading, in turn, to increased friction and new outbreaks of violence.

Finally, reference should be made to the purely procedural side of *Verbitsky*, namely the establishment of a "Dialogue Table" involving provincial authorities and NGOs. While dialogue was intense during the first two years after the judgment was issued, it then came to a complete standstill. A recurrent problem was the lack of representation of the various government agencies with jurisdiction in the area, which barred any substantial headway in planning.[140] Beginning in 2007, claims were made that the new provincial authorities hindered the operation of this mechanism, thus neutralizing its effectiveness.[141]

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[132] Pedro Lipcovich, *Tienen Condiciones Inhumanes*, Página 12 (Arg.), Mar. 20, 2010, at 6.
[133] *Id.*
[134] COMISIÓN PROVINCIAL POR LA MEMORIA DE LA PROVINCIA DE BUENOS AIRES, INFORME ANUAL 44 (2012) [hereinafter CMP INFORME].
[135] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 123, at 16.
[136] Law No. 220/14, Apr. 4, 2014 [27273] B.O. 1.
[137] Suprema Corte de Justicia Provincia de Buenos Aires, 13/8/2014, "Comisión Provincial por la Memoria de la Provincia de Buenos Aires v. Provincia de Buenos Aires / Inconstitucionalidad decreto 220/14."
[138] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 126, at 211.
[139] CMP INFORME, *supra* note 134, at 216–51.
[140] *Cf.* Puga, *supra* note 129, at 27.
[141] *Cf.* Lipcovich, *supra* note 132.

It should be borne in mind that the figures in this field are manipulated by government agencies, such that they are scarcely reliable as the basis for a conclusive opinion on the impact of the Supreme Court's decision. There seems to be consensus that it had a moderately positive impact in the first years, but the initiative then lost political support and the situation became one of stalemate and clear retrogression on certain issues.

This failure may be due to the low level of commitment of the provincial authorities. It should be noted that the Supreme Court of Argentina did not remand its decision to the Supreme Court of the Province of Buenos Aires, which, to some extent, may explain the lack of engagement on the part of local political and judicial authorities to tackle the task of formulating long-term solutions. The Supreme Court of Argentina has thus called for "active involvement of the provincial Judiciary in matters that are vital to the enforcement of the remedy, but has done without the involvement of the provincial courts in the definition of the problem."[142] It is also notable that the Supreme Court's decision did not impose any specific sanctions for noncompliance with or failure to abide by the demands made therein.

In summary, scholars have highlighted in recent years the difficulties inherent in standing by the decision in *Verbitsky*. In 2009, it was asserted that the minimum objective "is still far from achievement,"[143] as CELS itself then denounced that "excessive population density and overcrowding continue to loom large at detention centers in the province" and that "the current scenario is one of clear retrogression vis-à-vis the progress attained during the two years immediately following the ruling in *Verbitsky*."[144] As political support for this initiative on the part of the province's authorities dwindled after 2009, it is not surprising to hear that the situation of detainees has not improved in practice, let alone substantially, nor is it possible to say that minors are currently held in appropriate facilities.[145] It follows that nine years after the Supreme Court's decision, the perception among both public

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[142] Leonardo G. Filippini, *Superpoblación Carcelaria y Hábeas Corpus Colectivo*, REVISTA LEXIS-NEXIS BUENOS AIRES [R.L.N.B.A.] 260, 265 (2005).

[143] Gustavo Maurino & Martín Sigal, *Halabi: La Consolidación Jurisprudencial de los Derechos y Acciones de Incidencia Colectiva,* Jurisprudencia Argentina [J.A.] (2009).

[144] CENTRO DE ESTUDIOS LEGALES Y SOCIALES, DENUNCIA INCUMPLIMIENTO. PROPONE MEDIDAS. SOLICITA AUDIENCIA PUBLICA. 2 (2009), *available at* http://www.cels.org.ar/common/documentos/denuncia%20incumplimiento%20%20solicita%20audiencia%20%20publica%20final.pdf.

[145] *Cf.* Puga, *supra* note 129, at 27.

opinion and experts is that the ruling "continues to be difficult, if not impossible, to comply with."[146]

D. The Environment: Mendoza

Mendoza is a case deriving from a claim filed by seventeen persons due to environmental contamination at the Matanza-Riachuelo river basin. In the complaint, the plaintiffs sought monetary compensation, an end to pollution, and environmental remediation. In so doing, they claimed that the federal government, the Province of Buenos Aires, and the City of Buenos Aires should be held liable. At the same time, they filed suit against forty-four polluting companies for discharging hazardous waste directly into the river without having built any treatment plants. It should be recalled that close to 5,000,000 people live in the basin of this river, one of the most heavily polluted worldwide.

The lawsuit was not commenced as a class action but as an ordinary civil proceeding under the original jurisdiction of the Supreme Court of Argentina. The Supreme Court issued a first judgment on June 20, 2006 holding that a distinction should be made between individual and collective interests.[147] The action for damages sustained by each individual was to be pursued following the ordinary procedural steps before the lower courts. At the same time, the Supreme Court ruled itself competent to hear the claim regarding the collective interest, aimed at the remediation of the riverbed and the prevention of future damage.[148]

A proceeding characterized as an "expedited environmental proceeding without specific legal regulation"[149] thus commenced, sparking great interest among the public. Requests for information and public hearings then followed, through which the parties involved regularly briefed the Supreme Court.

Throughout 2006, the Supreme Court focused on determining who would be the parties to the action, as there were no distinct pre-established criteria for these types of cases. The decisions rendered in this regard spurred action by Congress, and at the end of 2006, it passed Law No. 26168.[150] The result was the creation of the Matanza-Riachuelo Basin Authority (*Autoridad de la*

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[146] Víctor Bazán, *La Corte Suprema de Justicia de la Nación y Algunas Líneas Jurisprudenciales Salientes en Materia de Derechos Fundamentales*, L.L. (2012-B-966, 973).

[147] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], *Mendoza*, Fallos (2006-329-2316).

[148] *Id.*

[149] LORENZETTI, *supra* note 117, at 47.

[150] Law No. 26.168, Dec. 5, 2006 [31047] B.O. 1.

Cuenca Matanza-Riachuelo) (ACUMAR) as an interjurisdictional body governed by public law.

Following a special reporting procedure and several other public hearings, the Supreme Court passed judgment on July 8, 2008.[151] What is especially worth noting is that it was forward-looking in its vision, defining general objectives as well as "the guidelines that the Basin Authority is to follow regarding public reporting requirements, contamination originating from industrial activities, remediation of waste dumps, cleanup of river banks, expansion of the drinking water network, rainwater drain systems, sewerage, and emergency sanitation plan."[152]

In short, this decision ordered the Federal Government, the Province of Buenos Aires, and the City of Buenos Aires to comply with a mandatory program called Comprehensive Environmental Remediation Plan (*Plan Integral de Saneamiento Ambiental*) (PISA) for the Matanza-Riachuelo Basin. The public agency responsible for compliance with PISA is ACUMAR, chaired by Argentina's Secretary for the Environment and Sustainable Development and also made up of representatives of the three jurisdictions held responsible.

In this same ruling, the Supreme Court made a decision not covered by any legal provisions and otherwise unprecedented, whereby it delegated the judgment enforcement procedure to a federal trial court in the city of Quilmes.[153] For the purposes of such enforcement task, the Supreme Court vested this lower court with exclusive jurisdiction of all matters associated with compliance with the judgment for relief and all cases relating to collective environmental damage in the Matanza-Riachuelo river basin. The lower court was also to act as a reviewing court in respect of all administrative acts issuing from ACUMAR. All decisions made by the federal court in the exercise of the delegation of authority received may be appealed directly to the Supreme Court.[154]

Additionally, the decision granted powers to the enforcement court to direct the investigation of crimes deriving from noncompliance with the orders made in the decision and to apply and set the amount of fines for failure to fulfill the obligations spelled out in it.

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[151] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz v. Estado Nacional," (2008-331-1622) (Arg.).

[152] LORENZETTI, *supra* note 117, at 223.

[153] Francisco A. Macias et al., *La Corte Suprema de Justicia de la Nación Ordena Sanear la Cuenca Matanza – Riachuelo*, MARVAL, O'FARRELL, MAIRAL (Aug. 8, 2008), http://www.marval.com.ar/publicación/?id=5445.

[154] *Mendoza*, *supra* note 147, at 1645–46.

The ruling also noted that failure to adhere to any of the deadlines set out in the program would result in the accrual of a daily fine to be enforced by the chair of ACUMAR. The Supreme Court also entrusted the Office of the Federal Ombudsman (*Defensor del Pueblo*) and certain NGOs (*Asociación Ciudadana por los Derechos Humanos* [ACDH], *Asociación de Vecinos de La Boca* [AVLB], CELS, *Fundación Ambiente y Recursos Naturales* [FARN] and Greenpeace) with the formation of a collective body charged with monitoring PISA, as well as with representing the public interest within the process of enforcement of the judgment and fostering citizen involvement.[155] In reference to the scope of the directives given by the Supreme Court, Chief Justice Lorenzetti explained that no detailed procedures were established for the administrative authorities to follow. Rather, the Supreme Court limited itself to setting "objectives, including a description of stages according to the various sources of contamination and the timelines to be met."[156]

On the basis of this particular institutional structure, framed specially to accommodate this process, work got underway. But one year after the Supreme Court's decision was passed, critics began pointing to instances of noncompliance with the plan and non-observance of the timelines.[157] Two years after its ruling, the Supreme Court issued a harsh decision admitting that "two years having passed since such ruling, and despite continuous demands from the judge vested with delegated authority, there is evidence of instances of noncompliance for which no sufficient justification has been provided"[158] and threatened to impose fines on the officers involved.

More than eight years after the beginning of the proceedings, it can be asserted that *Mendoza* managed to seize the public attention. The Supreme Court's initiative, coupled with the initial political support of the federal government, enabled the adoption of measures that only entail, however, isolated instances of progress. Among the identified problems, especially serious is the difficulty in coordinating multijurisdictional action. ACUMAR is made up of three states aligned with different political parties that are at loggerheads with each other. In addition, the economic interests of the riverside companies have been brought to bear on the plan.

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[155] Silvia Coria, *Presentación de un Case Argentino de Acceso a la Justicia Ambiental: Caso "Mendoza,"* IJE EDITORES (Aug. 29, 2012), http://www.ijeditores.com.ar/artículos.php?idarticulo=62812&print=1.

[156] LORENZETTI, *supra* note 117, at 187.

[157] *See* Antonio G. Gómez, *A Más de un Año del Fallo Mendoza*, L.L. (2009-E-292).

[158] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], *Mendoza*, I.J.E. (2010-XXXIX-658).

The official data, which ACUMAR submitted to the Supreme Court in 2013,[159] shows that headway has been made in eradicating contaminating industries in the Dock Sud area; 69% of open-air waste dumps have likewise been eradicated, and various waste treatment measures have been adopted in fourteen municipalities; the towpath has been cleared, and some 1,059 families have been relocated; numerous measures have been implemented to provide medical care to those affected by environmental hazards; and campaigns have been launched for ongoing monitoring of water and air quality at various spots within the basin.

Nonetheless, other reliable, independent sources claim that the advances are not as significant as maintained by ACUMAR, as the means employed to resolve some of the conflicts underlying the issue are insufficient in proportion to existing risks and the damage suffered by both the inhabitants and the environment. A report prepared by the General Auditing Office of the Nation (*Auditoría General de la Nación*) (AGN) shows under-executions of the budget's appropriations and that the results submitted by ACUMAR have been particularly unclear, which impedes an objective assessment of any headway made in the relevant areas.[160]

For example, according to official figures, there are 12,701 production facilities on the banks of the river, of which 6,949 are industrial facilities and a mere 177 have completed the Industrial Reconversion Program.[161] This suggests that the pace of progress is inadequate.[162]

In the case of open-air waste dumps, a major regression has occurred. Internal audit units of ACUMAR concluded in an undisclosed report that in eleven municipalities almost 70% of the waste dumps that were previously closed, reappeared within a year.[163] In addition, the report reveals a complete lack of surveillance and that waste containers were placed in only 3% of these locations. According to the press, this situation is attributable to the lack of engagement of local authorities.[164]

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[159] ACUMAR, INFORME 2013 (May 15, 2013), *available at* http://www.acumar.gov.ar/pdf/Audiencia_13_mayo_2013/audiencia.html#/0.

[160] AUDITORÍA GENERAL DE LA NACIÓN, INFORME INTEGRAL DE LAS ACTIVIDAD DEL PISA (Dec. 18, 2013), http://www.agn.gov.ar/files/informes/2013_250info.pdf.

[161] ANDRES NÁPOLI, FARN, A 5 ANOS DEL FALLO DE CORTE 3–4 (2013), *available at* http://www.farn.org.ar/wp-content/uploads/2013/07/napoli_riachuelo+anosdelfallo.pdf.

[162] *Id.*

[163] Laura Rocha, *Riachuelo: Reapareció el 70% de los Basurales Erradicados*, DIARIO LA NACIÓN (Arg.), Oct. 30 2013, § 1, at 28, *available at* http://buscar.lanacion.com.ar/Riachuelo%20%20Reapareci%C3%B3%20el%2070%20%20de%201os%20Basurales%20Erradicados.

[164] *Id.*

With regard to family relocations, one leading NGO, *Fundación Ambiente y Recursos Naturales* (FARN), has argued that despite the progress claimed by the authorities, quality of life has not improved substantially, in view of the poor basic living conditions in the new homes.[165] In agreement with this evaluation, the Federal Ombudsman has also raised the issue and denounced a lack of concern for the rights of relocated persons.[166]

As for the Remediation Plan, the policies put into effect have also been the object of bitter criticism owing to the absence of a proactive approach to health care issues and a lack of preventive intervention. Among other things, this explains the claims that there is still a large number of children with harmful lead content in their blood.[167]

Specifically in connection with water quality, Greenpeace has shown that there are no tangible improvements or a measurable trend toward better quality of surface waters, which continue to be severely contaminated.[168] They still exhibit high levels of heavy metals like lead and chromium and of organic matter, while oxygen levels have declined to nil, all of which helps to cause a deleterious impact. An independent study published in 2013 found that 80% of water samples taken from wells near the Matanza-Riachuelo river basin were not safe for drinking due to contamination.[169]

Overall, there are no stable, comprehensive policies targeting the substantive issues that lie at the core of this environmental degradation such that any partial advances may become permanent. Clearly, there are no adequate controls over the disposal of industrial waste into the river, which is the primary reason why it continues to be contaminated. In recent years, the problem has been compounded by a lack of political engagement, which is only corroborated by the serious difficulty observed from the very beginning in ensuring the availability of funds for the required tasks.[170]

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[165] NÁPOLI, *supra* note 161, at 3–4.

[166] María Laura Barral & Diego F. Doat, *Cuenca Matanza – Riachuelo: Análisis de los Inconsistentes Planes de Relocalización Presentados Por el GCBA*, REVISTA INSTITUCIONAL DE LA DEFENSA PÚBLICA DE LA CIUDAD AUTÓNOMA DE BUENOS AIRES.

[167] ASOCIACIÓN DE VECINOS LA BOCA, RIACHUELO: EL 25% DE LOS CHICOS DE LA VILLA 21–24 TIENE PLOMO EN SANGRE (Aug. 20, 2013), http://www.avelaboca.org.ar/sitio/index.php?id=703.

[168] GREENPEACE, LAS AGUAS SIGUEN BAJANDO TURBIAS (2013), *available at* http://www.greenpeace.org/argentina/Global/argentina/report/2013/contaminacion/Analisis-CalidadaguaRiachuelo2008-2012%20Greenpeace.pdf.

[169] Malena Monteverde et al., *The Origin and Quality of Water for Human Consumption: The Health of the Population Residing in the Matanza-Riachuelo River Basin Area in Greater Buenos Aires*, SALUD COLECTIVA, Apr. 2013, at 53, 53–63.

[170] *Cf.* Press Release, FARN (Dec. 27, 2011), *available at* http://www.farn.org.ar/newsite/archives/12612.

Responsibility for the day-to-day execution of these plans fell with a lower court in Quilmes, supported with vast resources, personnel, and substantial decision-making power. An ad hoc procedure, not otherwise contemplated by law, was implemented which included the power not only to impose fines but also to order temporary arrests. But as was to be expected, the AGN verified the existence of irregularities and a lack of transparency in several remediation projects. The large amount of power concentrated in the judge, unrestrained by the absence of a clear-cut legal framework, led to abuses and claims of corruption, which ultimately prompted the Supreme Court to remove the judge from his position and to file criminal charges against him.[171] The outcome has been that the *Mendoza* case is now at a complete deadlock.

Consequently, it may be asserted that the remediation efforts undertaken by the Judiciary have so far achieved some progress in certain specific areas and have otherwise succeeded in placing the issue on the public agenda. But as far as measurable results are concerned, the expectations among experts as well as the public have not been satisfied, as shown by the aforementioned reports, the press,[172] the University of Buenos Aires,[173] and legal scholars.[174]

IV. LESSONS FROM THE COMPARATIVE ANALYSIS

A number of lessons may be drawn from the Public Law Litigation experience in the United States and in Argentina. In this regard, it is possible to identify a set of principles that make up a model that may prove useful to analyze legal frameworks and practices in both countries. The comparative analysis will show if these principles are complied with in each country and to what extent they may be deemed as generally valid.

For the sake of clarity, it is necessary to distinguish those principles that have a political connotation from those that are purely technical. The political conditions listed below are descriptive rather than normative in nature, and allow for an analysis of the role that the courts will need to perform in their interaction with other power-holders. The discovery of generally valid technical requirements carries a normative edge. They encompass certain issues relating to the legal framework deemed

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[171] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," I.J.E. (2012-LXVI-596).

[172] *See, e.g.*, Rocha, *supra* note 163; *La Historia del Saneamiento Suma Promesas Incumplidas*, Diario Clarín (Arg.), Nov. 6, 2013, § 1, at 7; *Falta de Ejecución de los Fondos Para Sanear el Riachuelo*, Diario Perfil (Arg.), July 7, 2013, § 1, at 18.

[173] Editorial, *El Saneamiento del Riachuelo*, Diario La Nación (Arg.), May 27, 2012, § 1, at 22.

[174] *See, e.g.*, Bazán, *supra* note 146, at 972; Maurino & Sigal, *supra* note 143, at 41.

indispensable for the decisions of the Judiciary to have a measurable impact on reality.

A. Political Conditions

1. Coordination with the Political Branches

One of the most controversial claims of the leading U.S. scholars in this field is that when it comes to the political conditions, no judicially driven reform will have a significant and sustained impact without a consensus among the public and the coordinated and collaborative action of the political branches of government.[175]

The American experience shows us that it is not clear at all that the Judiciary, acting alone, is able to exert a decisive influence on public opinion regarding a specific issue or to overcome even localized resistance to change in the operation of bureaucratic agencies. At the same time, it is possible to observe that the activity of the courts is ineffective when coping with adverse public opinion nationwide or with ongoing conflict between the political departments of the federal government.

As discussed above, desegregation in the South yielded tangible results upon the enactment of the Civil Rights Act of 1964, which authorized the federal government to cut off federal funds to school districts engaged in racial discrimination.[176] It was through joint action on the part of all three branches of government that real change started to unfold. Judicial activity, in and of itself, was no agent of change. As explained by Tushnet, only when "faced with the prospect of losing access to federal funds, school systems desegregated."[177]

This political perspective sheds light on the true role that courts play in reform movements. Courts are "quite important to these movements, but

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[175] *See, e.g.*, ROSENBERG, *supra* note 17, at 111 (arguing that *Brown* did not produce any significant change in public opinion regarding racial segregation at schools); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1615–20 (2003) (discussing termination of desegregation orders in the 1990s and resulting resegregative effects); David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & POL'Y 387, 404 (2002); Gerald N. Rosenberg, *Tilting at Windmills:* Brown II *and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 LAW & INEQ. 31 (2006) (arguing that consent decrees are incapable of altering political will to achieve compliance). *But cf.* MCCANN, *supra* note 74 (arguing that sometimes litigation can be a catalyst for social movements).

[176] ROSENBERG, *supra* note 17, at 52, 71; *accord* Klarman, *supra* note 19, at 213; Tushnet, *supra* note 11, at 1709; West & Dunn, *supra* note 19, at 7.

[177] Tushnet, *supra* note 11, at 1706.

they are not the sole player, and often not even the most important player."[178] Where judicial action is not supported by the elective branches of the federal government or in cases of stark opposition to stances firmly adopted by interest groups, judicial action "is usually unsuccessful, and any court decisions in one's favor are likely to meet with considerable popular resistance,"[179] such that they prove ineffectual.[180] This is not only to the detriment of the affected groups, whose desire for change will remain unfulfilled, but it also jeopardizes the authority and prestige of the Judiciary.

It follows that in matters of structural reform, judicial activity must, to the extent possible, be implemented strategically, encouraging power-holders to cooperate in a sustained fashion over time.[181] The support and cooperation of administrators in middle levels of bureaucracies is especially meaningful for judicial activity to be fruitful, as it is primarily the officers in such levels that are likely to be affected by reforms. When judicial action succeeds, it provides cover or a tool for leverage in the relationship of a bureaucracy with the legislative and the executive branches, or when "administrators and staff are willingly involved in negotiation, change can occur."[182]

The experience in Argentina seems to confirm these controversial insights. The cases selected by the Supreme Court to undertake structural reform have not met with opposition on the part of the other branches of federal government or of majority public opinion. On the contrary, the initial momentum gained in *Verbitsky* and *Mendoza* was in line with initiatives advocated by the federal government and its allies. Then, when active support from the elective branches waned, reforms came to a standstill and even retrogression became apparent.

In *Verbitsky*, the nub of the case was the question of prison conditions, and while not a priority issue among public opinion, it has not encountered resistance. As for the posture taken by the political branches, recall that Horacio Verbitsky, a journalist and chair of an NGO very close to the federal government, commenced the case. However, once the initial stage was completed, the case came to a standstill, as discussed above. This was

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[178] Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1549 (2004).

[179] *Id*. at 1548.

[180] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 377–85 (2010); Robert E. Buckholz, Jr. et al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 837–42 (1978).

[181] *See* Balkin, *supra* note 178, at 1569; Fiss, *supra* note 5, at 54; Kim, *supra* note 90, at 961; West & Dunn, *supra* note 19, at 5.

[182] ROSENBERG, *supra* note 17, at 311.

particularly noticeable following changes in the provincial government and the election of Daniel Scioli. Scioli is a governor from the same political party as the federal government, but from a different faction than the one led by Verbitsky. It is thus patent that results were obtained when coordinated action existed between the Supreme Court, the federal government, and the provincial government. When this alignment wore thin, the Province of Buenos Aires withdrew its support, the case reached a stalemate, and some of the results achieved were reversed.

The environmental issues in the Matanza-Riachuelo river basin that gave rise to *Mendoza* had been a matter of concern among various political parties in the national political arena—or so they had seemed to be in their political talk. In subsequent years, the issue continued to raise concern among political parties and public opinion; promises were reiterated but no results were ever in sight. During the Néstor Kirchner Administration and the first years of Cristina Fernández de Kirchner's presidency, the environmental question was given a boost by the Executive, in parallel with the decision in *Mendoza*. In tackling the issue, the Supreme Court used arguments similar to those deployed by the federal government, and in deciding the case, it held several districts and private players liable. Within this context, Congress expressly endorsed the initiative by passing Law No. 26168, whereby ACUMAR was created. In the enforcement stage, the Supreme Court remained aligned with the federal government, as evidenced by the fact that the remediation tasks were delegated to the federal court of Quilmes, a district politically close to the Executive.

But like in *Verbitsky*, the support of the political authorities in executing the plans gradually eroded. Aware of the lack of commitment and inefficiency of some of the agencies and local authorities who had the duty to comply with the remediation plan, the Supreme Court urged those involved into action, but was met with a tepid response, if at all.[183] What we have today is an issue that was removed from the political parties' platforms and a judicial case caught in a quagmire amid corruption scandals.

Thus, the Argentine experience shows that the Supreme Court has not put structural remedies at odds with the agenda of the political branches of government or of public opinion. Rather, evidence suggests that in these cases, the Supreme Court initially acted in accord with the central government and that the judicial proceedings lagged behind precisely because, among other reasons, political support eroded over time and

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[183] *See* Coria, *supra* note 155, at 816.

coordination with central government political players eventually disappeared.

2. Authority of the Judiciary

As pointed out in the preceding section, the support for reform processes from public opinion and the political branches of government is usually inconsistent. To ensure the continuity of reforms, the Judiciary would have to assert its force at some critical instances. In this regard, the experience in the United States shows that in the cases in which structural remedies had a sustained impact over time, it was crucial for the Judiciary to have enough authority to empower the judges to undertake the administration of resources before they got into the hands of traditional political players. What is more, along with the need for legal instruments of coercion to operate as an assurance that the judicial decision will be complied with in a timely manner, there is the need for the political system to be mature enough to regard any act of disobedience of a court order as intolerable.

This notion, which looks elementary enough, is most often taken for granted or otherwise not analyzed in depth by legal scholars. It is nonetheless the key concept on which the system of judicial structural reform pivots in the United States. Chayes was among the first to note this, indicating that judges in the United States could carry out these functions effectively "only by drawing on the legitimacy and moral force that courts have developed through the performance of their inherent function, adjudication according to the traditional conception."[184] This means that, unlike the situation in other countries, the experience in the United States is largely accounted for by the "independence and prestige of the federal judiciary."[185] It is within a system having these characteristics, in which the courts have earned for themselves a significant position of power and legitimacy, that they have managed to use their authority to propel social change.

The school desegregation and prison reform cases in the United States demonstrate that the starting point for activation of the structural reform system has been the strong affirmation of judicial authority. In the case of schools, lower court judges in the southern states had a difficult task in the beginning, since they could only rely on the nominal support of the highest

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[184] Chayes, *supra* note 102, at 1304.
[185] *Id*. at 1310.

court in the land.[186] In these circumstances, it was necessary for the Supreme Court to make full use of its authority and legitimacy to overcome resistance from the political system and to explicitly endorse the reform process. Fiss underscores this aspect of the process, saying that, "[a]t critical junctures—*Cooper v. Aaron*, the faculty desegregation cases of the mid-1960[s], and *Green v. County School Board*—the Warren Court stepped in,"[187] thus preventing judicial efforts from coming to nothing.

Once the judiciary has asserted its authority within the political system, the means required to ensure compliance with its decisions must be firmly established, either via statutory instruments or case law. In the American system, the key components of this structure include the prerogative of the courts to penalize officials with fines or criminal sanctions for contempt[188] in cases where "the wrongdoing largely consists of disobedience of judicial orders."[189] Thus, the most "prominent feature of structural injunctions is that the district court judge has very broad power to issue orders, to revise them as he or she sees fit, and to enforce them by threatening to hold violators in contempt of court."[190]

Only when the judiciary can carve out its distinct share of power vis-à-vis the other branches of government, and the technical means are in place to effectively penalize officials that do not abide by court orders, can a structural reform process begin to be regarded as feasible.

This conclusion applies both to a strongly unilateral model, in which the judge designs and enforces a mandatory specific remedy, despite steadfast opposition from the defendant authority, and to modern multilateral or experimentalist models, in which the judge provides a forum for stakeholders to negotiate and devise a solution that will eventually be included in a voluntary settlement or consent decree. Voluntary settlements or consent decrees may thus be negotiated by the parties, but they are conceived as a "written set of duties and deadlines with intermediate milestones, all backed up by the court's power to hold the defendants in contempt."[191] Moreover, the authority of the court is needed not only as an assurance of the

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[186] *See* Klarman, *supra* note 19, at 216; JACK W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

[187] Fiss, *supra* note 5, at 1.

[188] Melnick, *supra* note 90, at 20.

[189] Fiss, *supra* note 5, at 24.

[190] Melnick, *supra* note 90, at 25, 55; *accord* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001) (arguing that the relative availability of sanctions is an important factor in determining whether particular constitutional rights are implemented).

[191] SANDLER & SCHOENBROD, *supra* note 66, at 63.

commitments assumed, but also as the bedrock of the negotiation process. Advocates of multilateral models draw on this premise in devising solutions for structural reform. In this regard, Strum cautions that "the deliberative model does not assume or require that consensus be reached. The model provides the backstop of a judicially-imposed remedy in the event the participants are unable to reach agreement."[192]

Charles Sabel and William Simon propose a form of intervention in which the judiciary becomes an appropriate forum for the destabilization of power structures that operate as a barrier to change, rather than as a source of solutions. These authors suggest that the terms of decrees have altered over time, becoming more "flexible and provisional," and more focused on "procedures for ongoing stakeholder participation and measured accountability."[193] But even in these developed, flexible, experimentalist models, stakeholders can rely on the vital feature of the authority of the court, which does not serve merely as a "power broker" or forum for the discussion of remedies but rather provides the implicit and yet distinct possibility of decisive background intervention. "These background sanctions function as a kind of 'penalty default'—a result that no one is likely to prefer, intended to induce the parties to negotiate a better one."[194]

In Argentina, these critical conditions for judicially-driven reform are not fully satisfied. The Supreme Court has resorted to high-profile structural reform cases in an effort to gain the legitimacy and political power it had not previously achieved. The judiciary in Argentina does not have the prestige, tradition, or the institutional strength of its counterpart in the United States. During the twentieth century, Argentina, like most other Latin American countries, has fallen prey to coups, military regimes, and authoritarian democratic governments that have gradually eroded the independence and legitimacy of the judiciary.[195] Even in times of democratic rule, the incumbents have managed to unseat Supreme Court members and to appoint judges of their own political complexion in their stead. Since 1983, Argentina has succeeded in cementing stable democratic rule, but the Supreme Court still has undergone reshuffling to the detriment of its authority. The number of Supreme Court justices was increased in 1990 and some of its members were impeached in 2002, 2003, and 2005.

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[192] Sturm, *supra* note 2, at 1439; Zaring, *supra* note 87, at 1029.
[193] Sabel & Simon, *supra* note 4, at 1015.
[194] *Id*. at 1067.
[195] *See, e.g.*, GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (2005); Landau, *supra* note 7, at 244.

As for the availability of technical instruments for enforcement, Argentina, like the United States, has mechanisms in place whereby criminal liability for contempt may be attached to those who willfully disregard judicial orders.[196] Nevertheless, trial judges in the U.S. have more extensive power to declare someone in contempt than judges in civil law systems. In Argentina, a court with criminal jurisdiction must prove the offender guilty in a special procedure before being punished. Therefore, government officials do not perceive criminal sanctions as a real threat. This has become patent in notorious cases of recent years, in which the orders of the Supreme Court have been met with blatant disobedience without any visible judicial or political consequences.[197]

With regard to pecuniary penalties imposed on noncompliant officials personally, the traditional view was that they were a tool to coerce compliance with court-ordered measures.[198] This approach has now been countered by Article 9 of the recently enacted Law No. 26854,[199] which provides that courts may not impose pecuniary penalties on government officials personally. Although this provision will probably be challenged as unconstitutional, it does lay bare the low-level commitment of the political branches when it comes to respect for the authority of the courts.

In summary, this basic political condition is far from being fulfilled in Argentina. The strategy of using structural remedies in aid of legitimization has helped the Supreme Court position itself more favorably in the eyes of the public, but has so far failed as a tool for decided assertion of its authority. Further, this deficiency is yet another reason that explains the discrete impact of judicial mandates over time, and specifically appears as a large obstacle to the successful implementation of structural remedies, whether in a unilateral or in a multilateral model.

3. Checks on the Judiciary

Since structural remedies began to be used in the United States, scholars have noted that one major challenge would be how to establish a pattern of adequate control over the activity of the courts. Once the department that is

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[196] CÓD PEN. art. 239 (1984), *available at* http://www.infoleg.gov.ar/infolegIntrnet/anexos/15000-19999/1656/texact.htm#25.

[197] *See, e.g.*, Natalia Aguilar, *No se cumplen sentencias clave de la Corte*, Diario Perfil (Arg.), Feb. 2, 2013, at 21 (listing and describing high profile cases of disobedience of Supreme Court decisions); Editorial, *Impunidad para Intentar Cubrir la Retirada*, Diario La Nación (Arg.), Dec. 22, 2013, § 1, at 34.

[198] Lorenzetti, *supra* note 95.

[199] Law No. 26854, Apr. 29, 2013, [32629] B.O. 1 (Arg.).

constitutionally called upon to check on the political branches of government started to discharge managerial functions, the question arose as to which body would be fit to supervise the Judiciary. This is a pertinent issue to raise from a theoretical standpoint, within a broader reading that calls into question the democratic legitimacy of a non-elected body that becomes a manager of public resources, as well as from a purely practical standpoint, with a view to averting instances of abuse of power or corruption.

Clearly, to the extent that reform processes are postulated within the framework of legal discourse, it is institutionally difficult to implement some form of control by bodies outside of the Judiciary itself.[200] Even so, it is crucial to introduce mechanisms capable of cabining the discretionary exercise of this new judicial function, as there is otherwise the risk that instances of abuse will undermine the legitimacy of both the judicial process and the background substantive claim, thus leading to typical cases of "judicial populism."[201] The early studies by Fiss already showed that American legal writers underlined that structural reform processes pose a political threat to the ideal of judicial independence, because "[t]he desire to be efficacious leads the judge to attempt the remarkable feat of reconstructing a state bureaucracy . . . and that ambition in turn forces the judge to abandon his position of independence and to enter the world of politics."[202]

In the United States, the courts themselves have brought to light cases of corruption or collusion with the judge or between the parties. A strikingly illustrative example of this is Justice Lewis Powell's accusation that parties in a desegregation case had "joined forces apparently for the purpose of extracting funds from the state treasury."[203]

While claims of corruption or abuse of authority on the part of judges in the United States did exist, they were discrete if compared to the number of cases in which structural remedies were used. Therefore, it appears that in the United States the managerial role of the judge is not monitored by any formal body; rather, it suffices to have recourse in the general legal framework and in monitoring by the stakeholders involved.

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[200] *See* Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 47 (1982).

[201] *See* LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 280 (2007); Landau, *supra* note 7, at 235.

[202] Fiss, *supra* note 5, at 46. *See also* Sturm, *supra* note 2, at 1379 (claiming that, in some cases, courts abuse their power and act unfairly in the execution of their public remedial function).

[203] Milliken v. Bradley, 433 U.S. 267, 293 (1977) (Powell, J., concurring).

In countries like Argentina, the danger of abuse of power and corruption on the part of judges within the context of structural reform cases is potentially more acute. According to an international ranking compiled by Transparency International, Argentina ranks as low as 102nd among 176 countries.[204] Argentina also registers high levels of undue influence (140th), along with one of the lowest ratings in terms of trust in politicians (143rd), coupled with a very negative assessment of the institutional set-up (138th) according to a 2012–2013 report by the World Economic Forum.[205] In particular, the institutions perceived as being the most corrupt in Argentina are political parties, government officials, Legislatures, the police, and also the Judiciary.[206]

Specifically in connection with structural reform cases, the issue of corruption came dramatically onto the scene. The federal judge responsible for enforcement in *Mendoza*, was summoned to step aside amid serious allegations of corruption and abuse of authority, which resulted in criminal charges being pressed even by the Supreme Court. In removing him, the Supreme Court expressly stated that, as the case involved structural reform, he was to maximize caution in order to preserve "the confidence of society in the transparency of the procedures carried out."[207] Consequently, since November 2012, the *Mendoza* case, undeniably the most representative case championed by the Supreme Court in the structural reform scenario, "has been virtually at a standstill."[208]

In view of the different sociological and institutional contexts, it is thus plain that countries like Argentina are not readily prepared to count on the same control model as that in the United States. The existence of higher corruption levels and of a weak legal and institutional frameworks to combat lack of transparency issues requires the implementation of tailor-made, innovative solutions. It is necessary to provide for independent oversight of the actions of judges who become managers of sizeable amounts of public resources. Among other alternatives, it is reasonable to induce a more prominent role to be played by institutions formally outside the Judiciary,

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[204] TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2012, at 3 (2013), *available at* http://files.transparency.org/content/download/537/2229/file/2012_CPI_brochure_EN.pdf.

[205] WORLD ECONOMIC FORUM, GLOBAL COMPETITIVENESS REPORT 34 (Klaus Schwab ed., 2013), *available at* http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport2012-13.pdf.

[206] *Id.*

[207] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," I.J.E. (2012-LXVI-596).

[208] Pablo Tomino, *A Cinco Años de que se Ordenara Sanear el Riachuelo, Aún Queda un Largo Camino*, LA NACIÓN (Arg.), July 8, 2013.

such as the AGN or the Office of the Attorney General of the Nation ("*Ministerio Público Fiscal*") (MPF), as is the case in Brazil.[209]

B. Technical Requirements

1. Legal Regulation of Class Actions

A distinctive feature of structural reform processes is that they are collective in scope since they do not center on an individual but on a "group."[210] This premise calls for a redefinition of the traditional notion of "party," as the claimant appearing before the court does not exercise an individual and exclusive right, but rather asserts a right accruing to an indefinite number of people. Clear-cut rules of procedure must thus be laid down whereby the court can determine "whether the interests of the victim group are adequately represented"[211] as well as ensure that the basic requirements of due process and the right to a defense in court will be adhered to.

As noted before, the procedural avenue available in the United States for the filing of the most successful cases concerning school desegregation and prison reform has been that of class actions, especially those litigated under the Federal Rules of Civil Procedure as amended in 1966.[212] That year, a new system was mapped out to ensure that class members would be identified before the issuance of a final decision in the litigation and that they would be bound by it, except for special cases. Additionally, the 1966 "amendments introduced a more transactional approach to litigation and made the rules concerning party structure more flexible,"[213] and were specifically aimed at the improved implementation of structural reform processes.[214] At the core of this procedural device is certification of the class. Among the Federal Rules of Civil Procedure, Rule 23[215] is a general provision covering the various areas in which this instrument may be helpful, from civil rights suits to massive tort cases involving monetary claims.

In the case of Public Law Litigation, which engenders structural remedies, the requirements that are usually satisfied for certification of a

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[209] *See* Lesley K. McAllister, *Revisiting a "Promising Institution": Public Law Litigation in the Civil Law World*, 24 GA. ST. U. L. REV. 693 (2008).
[210] Fiss, *supra* note 5, at 19.
[211] *Id*. at 20.
[212] Chayes, *supra* note 200, at 27.
[213] Appel, *supra* note 8, at 215–16.
[214] Chayes, *supra* note 200, at 27.
[215] FED. R. CIV. P. 23.

class are those under Rule 23(b)(2). Here, the decision on certification results in a so-called "mandatory" class that does not provide class members with a right to opt out of the class. As explained in the Advisory Committee note to the 1966 amendment, Rule 23(b)(2) was adopted to enable the prosecution of civil rights actions and it does not extend to cases in which the appropriate final relief relates exclusively or predominantly to monetary damages.[216] Thus, in the context of civil rights litigation seeking declaratory relief for violation of constitutional rights, Rule 23(b)(2) actions are particularly appropriate.

The certification procedure is supplemented by techniques devised to preserve the rights of the individual members of the class, such as "broad notice of the suit and its processes, refusal to proceed until the original parties procure the representation of specified interests, recruitment efforts by special masters, and invitations to amici curiae."[217] Additionally, the law provides guideposts for the judge to evaluate whether the party applying for representative party status will fairly and adequately protect the interests of the class. The court will assess whether such party can act in an informed manner, diligently, and vigorously, and whether there is a possibility of conflicting interests or a risk of collusion.[218]

Upon certifying the class, the court appoints a class counsel, who acquires control of the proceedings. The court must also evaluate the ability of counsel to represent the interests of the class in a balanced, appropriate fashion, as well as consider the resources that counsel will commit to representing the class. To inform the certification decision, "the judge may conduct preliminary evidentiary hearings on the merits or the class issue, appoint special masters, request amicus briefs, or permit intervention in order to gather information."[219] In this regard, the clear statutory guidance furnished by Rule 23(g) is vital to the proceeding; even so, there is a very

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[216] Advisory Committee's Note to FED. R. CIV. P. 23 (1996); *see generally* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 4.11–.12 (2d ed. 1992) (describing Rule 23(b)(2) class actions in the civil rights context and outside of it).

[217] Sabel & Simon, *supra* note 4, at 1098.

[218] Chris Brummer, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1049 (2004). *But see* Chayes, *supra* note 200, at 37 (recognizing that the breadth of interests that may be affected by Public Law Litigation raises questions about the adequacy of the representation afforded by a plaintiff whose interest is normally traditional).

[219] Amy M. Reichbach, *Lawyer, Client, Community: To Whom Does The Education Reform Lawsuit Belong?*, 27 B.C. THIRD WORLD L.J. 131, 149 (2007).

real possibility that class lawyers will not adequately represent the interests of their clients.[220]

Finally, one of the salient features of Rule 23 is the broad binding effect of a class judgment on the parties involved in the dispute. Pursuant to subdivision (c)(3), the judgment rendered in class actions contemplated in subdivisions (b)(1) and (b)(2), whether or not favorable to the class, shall be final and binding on all class members.[221]

As set forth above, the most highly developed and effective forms of structural reform processes are handled through voluntary settlements or consent decrees. The unambiguous, thorough regulation of the various aspects of class actions and the class certification process under subdivision (b)(2) makes these negotiated solutions considerably easier to achieve.

Sabel and Simon highlight that the focal point in the multilateral model of structural litigation is that "the court must identify the affected people, assess the representativeness of those who purport to speak for them, and sometimes assign weights to the competing interests asserted in the process."[222]

In Argentina, there is no federal code or statute that provides for general, comprehensive regulation of class, group or collective actions that may give rise to structural reform. There are only laws containing specific provisions in areas like habeas corpus, consumer rights, or environmental law. These are scattered rules that only address some specific facets of collective processes, for example by granting consumer or environmental associations or certain public authorities broad standing to sue and by establishing basic guidelines regarding the extended effects of res judicata.

In *Verbitsky*, for instance, the action was maintained according to the procedure provided for in Law No. 23098 on habeas corpus.[223] The habeas corpus action, also provided for in Article 43 of the Argentine Constitution, typically entails an expedited, simple, prompt relief proceeding directed to restoring a person's freedom or to remedying an aggravation of detention conditions. But as the proceeding is expedited in nature, it leaves no room for a class certification process, for broad participation of third parties or amici curiae, or for expanded debate and proffering of evidence. The same holds true of an "*amparo*" proceeding[224]: they are both exceptional devices

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[220] Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 48 (2003).

[221] MARCY H. GREER, A PRACTITIONER'S GUIDE TO CLASS ACTIONS 191 (2011).

[222] Sabel & Simon, *supra* note 4, at 1097.

[223] Verbitsky, *supra* note 113; Law No. 23098, Oct. 19, 1984 [25538] B.O. 1.

[224] Art. 43, CONSTITUTIÓN NACIONAL [CONST. NAC.] (Arg.); Law No. 16986, Oct. 18, 1966 [21050] B.O. 1.

but are only to be resorted to in cases of urgency, and in the event of patent violations of constitutional rights. Thus, habeas corpus or *amparo* actions are not suitable for multilateral litigation requiring devices to accommodate the participation of various social sectors as well as rules for ample debate and evidence.[225]

In *Mendoza*, the action was brought under the procedure regulated by the General Environment Act No. 25675.[226] As noted earlier, this law does not offer exhaustive regulation of the collective process, but merely formulates a broad standing-to-sue standard, authorizes the judge to apply procedural rules more flexibly, and provides for extended effects of res judicata, subject to certain limitations. The law contemplates no mechanism for certification of a class that might be affected by environmental damage and gives no guiding principles to assess the appropriate representation of the plaintiff. As to the effects of the judgment, it provides that it will be final and binding on third parties unrelated to the litigation, except where the case is lost on account of evidentiary shortfalls. It should further be noted that the law contains no special provisions governing possible settlements.

What these cases evince is that Public Law Litigation initiatives have been undertaken without any apposite procedural regulation. The Supreme Court attempted to fill this void in the *Halabi* case,[227] in which it pointed to the failure by Congress to regulate this vital aspect of collective claims and expressly acknowledged the viability of a collective claim covering homogeneous individual interests, provided certain requirements are met. The Supreme Court explicitly stated in its decision that this device needed regulation in a manner such that legal actions should have "characteristics and effects analogous to those under the law of the United States."[228]

However, this type of approach, whereby the courts purportedly seek to fill a statutory gap, is particularly ineffective.[229] Consistent with its nature as a judgment, the Supreme Court's decision limited itself to outlining some elementary procedural issues, but failed to make provision for a myriad of

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[225] *See* Christian Courtis, *Tutela Judicial Efectiva y Afectaciones Colectivas de Derechos Humanos*, J.A. (2006-II-1215).

[226] Mendoza, *supra* note 114, Law No. 25675, Nov. 27, 2002 [30036] B.O. 2.

[227] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 24/2/2009, "Halabi, Ernesto c. P.E.N. Ley 25.873 / amparo ley," Fallos (2009-332-111).

[228] *Id*. at 118.

[229] *See* Claudio D. Gómez & Marcelo J. Salomón, *La Constitución Nacional y las Acciones Colectivas: Reflexiones en Torno al Caso* Halabi, L.L. (2009-C-338, 343); Eduardo Oteiza & Francisco Verbic, *La Representatividad Adecuada Como Requisito Constitucional de los Procesos Colectivos*, Semanario de Jurisprudencia Argentina [S.J.A.], Mar. 10, 2010 at 14; Jorge W. Peyrano, *Marginalia Acerca de los Procesos Colectivos*, J.A. (2012-III-1076).

aspects that are essential for a reasonable use of class actions and for the proper implementation of a multilateral model of structural reform.

The absence of clear statutory regulation at the federal level is now causing many practical problems. For example, this void is used as "an excuse for the filing of generic and vague complaints that curtail the exercise of one of the most significant constitutional safeguards, namely, none other than the right to a defense in court and to due process of law."[230] Issues of overlapping claims and jurisdiction likewise arise,[231] which defendants often exploit to delay litigation.

In any case, the most serious problem posed by the absence of comprehensive and appropriate statutory regulation is the lack of incentives to adopt a multilateral litigation model and to reach solutions in the form of a settlement. This is an essential feature of the regulation scheme in the area of Public Law Litigation, as may clearly be inferred from the experience in the United States. Therefore, it is important to highlight that the question does not revolve merely around filling a statutory gap, but rather around the absolute need to adopt the model for statutory regulation of class actions that best fits the dynamics of structural reform litigation.

In this connection, it is worth pointing out that legislative initiatives regarding collective claims in Latin America do not follow the American class actions model, but Brazil's collective claims model and the "The Ibero-American Collective Actions Model Code." In Argentina, the few statutes in force in this regard, such as the Consumer Protection Act[232] or the General Environment Act, as well as the majority of bills pending in Congress in this area,[233] are essentially patterned on the Brazilian model.

As regards Public Law Litigation specifically, the Brazilian model differs from the regulation of class actions under Rule 23 as follows:

> (i) it does not provide for a stage for class certification, as the focus is only on the expansion of standing to sue;
> (ii) individuals are in all cases given an opt-out right;

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[230] Pedro Zambrano, *El Derecho de Defensa en Juicios Ambientales*, L.L. (2006-F-625).

[231] *See, e.g.*, Corte Suprema de Justicia de law Nación [CSJN] [National Supreme Court of Justice], 10/11/2009, "Mendoza, Beatriz Silvia y otros c. Estada Nacional y otros / daños y perjuicios," Fallos (2009-332-2522).

[232] Law No. 24240, Oct. 13, 1993, [27744] B.O. 2.

[233] *See* B. No. 538-D-2013, 2748-D-2012, 3633-D-2012, 66-S-2013, 1045-S-2011.

> (iii) there are no objective standards laid down by law for the judge to pass on the adequacy of party representation or of class counsel;[234]
> (iv) the collective judgment, or the settlement reached,[235] is binding on all group members, but it is "vulnerable."[236] The decision must not prejudice the individual rights of class members, which may be asserted by using a separate individual procedural avenue (*secundum eventum litis*), nor does it bar relitigation of the issues when the collective complaint has been dismissed for lack of evidence (*secundum probationem*).

The reasons that have historically led Latin American countries to adopt a model having these differing features hinge on the idea that they have a poor notification system, unfit to make society aware of the existence of a collective claim, and that they lack a "culture" of collective processes as well as a legal bar or NGOs prepared to fund the prosecution of any such claim.[237]

But these objections simply cannot stand today. The difficulties associated with notification that were exposed more than thirty years ago should now be deemed overcome. Most countries can rely on the deep penetration of the media, internet, and mobile devices, even among the neediest sectors of the population. Moreover, the record in *Verbitsky* and *Mendoza* shows that countries like Argentina have developed a strong culture of collective processes over the last decade, with a mushrooming of NGOs now engaged in this type of activity.

It follows that in the current circumstances, those countries seeking to embrace the most successful models of Public Law Litigation should pass procedural legislation that would place the right incentives for negotiated reforms. Specifically, the procedural rules that are to govern structural reform cases should satisfy at least the following minimum requirements:

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[234] The Ibero-American Collective Actions Model Code does provide rules for evaluating the adequate representation of class counsel. However, these rules have not been enacted in Argentina.

[235] In Argentina, once approved by court, private settlements have the same binding effect as judicial decrees. *See* Leandro J. Giannini, *Transacción y Mediación en los Procesos Colectivos*, S.J.A. Nov. 2, 2011, at 42.

[236] María C. Eguren, *La Revisión de la Cosa Juzgada de Efectos Expansivos y los Diversos Factores Equilibrantes de los Procesos Colectivos*, J.A. (2006-I-1288).

[237] *See, e.g.*, Antonio Gidi, *Cosa Juzgada Colectiva*, *in* LA TUTELA DE LOS DERECHOS DIFUSOS, COLECTIVOS E INDIVIDUALES HOMOGÉNEOS 261, 264 (Porrúa ed., 2004).

> (i) a process for class certification providing for the appointment of a sole representative;
> (ii) the possibility of certifying a mandatory class, without opt-out rights;
> (iii) clear standards for the judge to evaluate, throughout the proceedings, if party representation and class counsel are adequate;
> (iv) the judgment and the settlement reached should be final and binding on all class members and definitively dispose of all issues raised, without the possibility, in ordinary circumstances, of instituting subsequent actions in connection therewith.

These requirements, which have driven the successful cases of structural reform in the United States, are key to the establishment of a class representative equipped with strong bargaining power and capable of offering both parties the possibility of a definitive solution that is immune from subsequent challenge via collective or individual claims. It is otherwise less probable that a multilateral model of structural reform can be implemented with a focus on negotiation and on disposition of the issues by means of settlements or consent decrees.

2. Agency Problems

As stated above, structural reform cases tend to place too much power in the hands of class representatives. Thus the system clears the way for them to abuse their position of control and strike collusive agreements to the detriment of the wronged group, of some segment of that group, or of government agencies. These agency problems emerged as one of the reasons for strong prejudice in Latin American countries against the use of collective claims.

A starting point to examine this issue lies in existing evidence that judges, when faced with a consent decree, generally act with "a great deal of timidity" and "are willing to let the parties, particularly the defendants, control the process and outcome of these lawsuits."[238] In these cases, it is a "controlling group"[239] or "organizational leadership,"[240] as it has come to be

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[238] Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1657 (2003).
[239] SANDLER & SCHOENBROD, *supra* note 66, at 61–62.
[240] Bell, *supra* note 79, at 500.

known, that usually imposes its will and drives the litigation, rather than "the class members themselves."[241]

At the same time, this anomaly can be readily identified as the political front. Specialized authors have pointed out that the political branches of government often resort to litigation to shirk their executive or legislative responsibilities toward the citizens. It has thus been criticized that in employing complex procedural devices, a court "allowed the use of its office to give political cover to a governor who should have taken responsibility for the decision on his own."[242]

Within the context of prison reform in the United States, correctional and law enforcement officers were usually collaborators in the litigation. The remedies in these cases, "frequently designed at least in part by the defendants themselves, very much served what at least some of those defendants saw as their interests: increasing their budgets, controlling their inmate populations, and encouraging the professionalization of their workforces and the bureaucratization of their organizations."[243]

In the field of educational reform, many authors have underscored the state of risk and disadvantage experienced by "clients whose educational interests may no longer accord with the integration ideals of their attorneys."[244] Here, one can often see class counsel "making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community."[245]

This turns the spotlight on the attorneys who act as representatives not only of their direct clients (whether individuals or organizations) but also of the class as a whole. In these scenarios, attorneys must act as "spokesmen for large groupings toward which they had duties and responsibilities different from those of the ordinary lawyer-client relationship,"[246] which normally worsens agency problems[247] and prompts attorneys to "advance their vision of the public interest, often at the expense of some of their clients."[248]

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[241] Kim, *supra* note 90, at 962.
[242] Sabel & Simon, *supra* note 4, at 1092.
[243] Schlanger, *supra* note 50, at 562–63.
[244] Bell, *supra* note 79, at 471.
[245] *Id.* at 512. *See also* Kim, *supra* note 90, at 963; Reichbach, *supra* note 219, at 139; Sturm, *supra* note 2, at 1415.
[246] Chayes, *supra* note 200, at 27–28.
[247] *See* Molot, *supra* note 220, at 47.
[248] SANDLER & SCHOENBROD, *supra* note 66, at 124; *accord* Maimon Schwarzschild, *Public Law by Private Bargain: Title II Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 909.

Several legal and institutional initiatives have been put forward to address these agency problems. First among them has been the demand for greater involvement of the judge in all phases of the lawsuit, especially in narrowing the issues[249] and subject to the duty to exercise close control over the content of any settlements agreed upon.

A second point of concern involves potential conflicts of interest, which make a strong case for expanding the participation of persons that might be affected by the decision. As Appel explains, although broad intervention may add time to the proceeding, "intervenors must intervene because the parties representing their interests are inadequate" and "attorneys for their interest are inept, inexperienced, overworked, underpaid, or all four."[250] Thus, there should be rules specifically devised to govern the activity of class actions counsel, compelling them, for example, to make full "disclosure of potential conflicts between class and attorney, or among class members themselves."[251]

Third, legislation must provide for mechanisms that can best ensure direct participation by the actual parties "rather than exclusive reliance on class counsel."[252] This should be balanced against the great deal of bargaining power that class representatives must exercise in multilateral models. Then, a proper mechanism to accommodate both interests at stake would be to regulate a phase in the court proceeding in which interested parties have the chance to make "suggestions about the settlement or object to its provisions, without enjoying the right to litigate the underlying liability of the defendant."[253] In other words, interested parties should be afforded a formal hearing to suggest that contents or changes be introduced before the decree can be approved or that, in certain cases, consent decrees be disapproved.[254]

In Argentina, class actions are not specifically and thoroughly regulated, which translates, in turn, into the non-existence of any of these special safeguards against possible conflicts of interest between counsel and some of the class members or against collusion with the representatives of the opposite party. Naturally, there are general provisions governing the practice of law that hold attorneys criminally liable where they assume the defense of adverse parties simultaneously or successively or deliberately prejudice their client's case.[255] However, none of these provisions are specific enough to

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[249] Molot, *supra* note 220, at 51.
[250] Appel, *supra* note 8, at 297.
[251] Reichbach, *supra* note 219, at 152.
[252] Kim, *supra* note 90, at 958, 965; Sturm, *supra* note 2, at 1424.
[253] Schwarzschild, *supra* note 248, at 911.
[254] *See id.* at 916.
[255] Art. 271 Cod. Pen.

spell out the disclosures that counsel should make within the framework of a class action lawsuit. There are no objective provisions to which the judges or class members can look for guidance in determining who is qualified to serve as class counsel.

Further, there is no law that formally contemplates the procedural devices needed to ensure third-party intervention and a fairness hearing involving all those potentially damaged. However, the proceedings in *Verbitsky* and *Mendoza* have in fact included the holding of public hearings and the establishment of collective bodies charged with opening dialogue pathways and channeling citizen participation in monitoring the execution of the plan. These public hearings notwithstanding, the standard used to grant the right to formally intervene in the lawsuit, whether as a party proper or as a third party entitled to participate and have its own say in the discussion, has at times been too restrictive.

In *Verbitsky*, the Supreme Court issued, as stated earlier, a judgment for relief and mandatorily set the core objectives of the reform plan, without remanding the case to the provincial courts or without any active involvement on the part of the respective governor. It has also been mentioned that the "Dialogue Table" did not manage to stay operative over the course of time. As for *Mendoza*, a flexible approach was used to determine the persons who would serve as representatives for the the plaintiff's side and those who would stand on the defendants' side.[256] However, a rather restrictive approach was later favored in order to dismiss other filings or refuse to hear other opinions that could have contributed substantially to the case.[257]

Regarding the content and openness of the hearings at the Supreme Court, it should be kept in mind that they were meant to pivot strictly on "certain

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[256] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/3/2007, "Mendoza, Beatriz Silvia c. Daños y Perjuicios," Fallos (330:1158) (Arg.) (on March 20, 2007, the Supreme Court decided which persons would be acting as plaintiffs, including the individuals who filed the original suit and the Federal Ombudsman. It also listed a group of NGO's that would be acting as third-party interveners).

[257] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/8/2008, "Asociación Ecológica Social de Pesca, Casa y Náutica c/Buenos Aires, Provincia de y otros s/ daños perjuicios," Fallos (331:1158) (the Supreme Court did not allow the intervention of public officers of great institutional relevance, such as the Solicitor General ("*Procurador General de la Nación*"); Buenos Aires ("*Defensor del Pueblo de la Provincia de Buenos Aires*") and the Public Defender General of the City of Buenos Aires ("*Defensor General de la Ciudad de Buenos Aires*"); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," I.J.E. (2011-VL-130).

core topics"[258] and held for informational purposes only. In the words of the Supreme Court, hearings usually served the objective of reporting on "the degree of progress in complying with the orders made"[259] but were not used for revising the adequacy of such orders.

It is clear that the scope of these hearings should be established by law. Not only to guarantee participation for informational purposes, but also to check on class counsels and allow for robust citizen monitoring of the content of consent decrees. Countries like Argentina should make appropriate provision for the possibility of maintaining actions in which any settlements reached are mandatorily binding on all class members; likewise, provision ought to be made for the overall involvement of the MPF in all matters in which a settlement or consent decree may be agreed upon.[260]

In sum, both settlements and consent decrees offer innumerable benefits as instruments for the resolution of collective disputes. But the very nature of collective rights calls for an analysis of the special conditions that must be present for a fair settlement to be deemed feasible and mutually beneficial for the parties involved.

3. Flexibility

Administrative activities are dynamic and rest on pragmatic decisions calculated to suit the needs of a particular case; decisions must thus be flexible enough to continuously adapt to a changing reality. Where administrative activities are undertaken by judicial bodies, whose discourse is naturally rights-oriented, the result can take the form of inadequacies and conflicts that lead to inefficient management of social conflict and the emasculation of the rights involved.

In the case of school desegregation, we have seen that top-down reform plans like "busing" yielded an unwanted result. The fact that, in many states, families moved to the suburbs to flee a forced integration "helped produce

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[258] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," I.J.E. (2011- XLIII-619).

[259] Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," Fallos (2012-335-1777). Another example is Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," I.J.E. (2012-LXVI-263), in which the Supreme Court called for a hearing, expressly saying that the purpose was solely "informational" and that possible modifications to the ongoing remediation plan will not be discussed.

[260] Law No. 24240, Oct. 13, 1993, B.O. 34 (Arg.) (provides that any agreement or settlement between the parties to a collective claim must be preceded by an opinion from the MPF stating whether the interests of the affected consumers or users have been adequately taken into account).

largely white suburbs ringing largely minority inner cities."[261] The origin of this unwanted effect of resegregation can be traced to the somewhat rigid approach originally employed to enforce *Brown*. Paradoxically, the white flight and geographic resegregation "[were] fully consistent with *Brown*, or perhaps more correctly, with what *Brown* had become."[262]

This is why in those instances in which judicial intervention has been particularly rigid, the impact of the reform has been weaker and counterproductive effects have multiplied. Additionally, the crystallization of certain standards adopted in a court decision or consent decree may have a discouraging effect, and hinder the formulation of more ambitious objectives beyond those set by the judges themselves. For example, it has been claimed that "the very rigidity of the *Jose P.* decree and the process it required made it more difficult for new mayors, new chancellors, or new boards of education to improve the entire system."[263]

These paradoxes are also very frequent in the environmental field. Here, it is not at all uncommon for a particular group to "obtain a court order forcing a local government to spend its scarce capital funds to meet a clean water act requirement that has limited environmental benefit but that causes the local government to delay other capital improvements that have greater environmental benefits."[264]

Logically enough, U.S. courts have acknowledged that structural reform decisions or consent decrees may be amended, revised, or mitigated both in the event of an "unforeseen" significant change in circumstances and when the proposed modification is suitably tailored to the changed circumstances.[265] But this avenue for revision is difficult to use, so it must be thoroughly regulated.

With regards to the situation in Latin America, it has been warned that these paradoxical consequences can be even more acute than in other regions. To the extent that inequality is more pronounced, certain groups find it more difficult to gain access to the judicial system, and thus, judicial decisions in the area of social rights are liable to have an overall adverse effect on the poorer segments of society in terms of distribution.[266]

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[261] *See* Balkin, *supra* note 178, at 1571.
[262] *Id.* at 1566.
[263] *See* SANDLER & SCHOENBROD, *supra* note 66, at 93.
[264] *Id*. at 8.
[265] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367 (1992).
[266] *See* Carlos Portugal Gouvêa, *Social Rights Against the Poor*, 7 VIENNA J. ON INT'L CONST. L. 454 (2013) (arguing that in Brazil, judicial decisions on the right to health, in particular, and social and economic rights, in general, tend to favor groups with access to the judicial system and have negative distributive effects on the poor).

In Argentina, despite the short track record in this field, it is clear that allowance has been made for the premise of flexibility. In the *Verbitsky* case, the establishment of a "Dialogue Table" by the Supreme Court was aimed at affording the system the required flexibility and capacity for ongoing adaptation of the objectives and orders issuing from the Judiciary. At the same time, a negative aspect was that the original decision was prepared without remanding it to the provincial courts and with scant involvement of the Province of Buenos Aires. This entails high chances of inadequacies in the quest for adjustment to the changing reality of a district riddled with economic difficulties. It also may explain the inefficiency that the "Dialogue Table" has had in actual practice.

As for *Mendoza*, it is worth noting that both the proceeding leading to the issuance of the judgment and the subsequent enforcement proceedings were handled as participatory channels, with a powerful response from the public and a large number of hearings. Although the Supreme Court went perhaps too far in restricting the formal participation of some relevant third parties and that the public hearings before it were marked by excessive rigidity, it should be conceded that, at least from a formal standpoint mechanisms were properly introduced for judicial orders to become more flexible and to be gradually adapted. It should also be mentioned that the enforcement court held numerous hearings in order to exchange ideas with ACUMAR, the municipal authorities, public utilities, and other players involved.[267] In addition, as stated by the Supreme Court itself, the reform plan consists of "a program setting out objectives and results, the contents and timelines for which have been accurately defined,"[268] but includes no detailed specification of the technical means to be employed, which choice has been left to the discretion of the enforcement authorities. It is thus clear that the reform plan was conceived with adequate flexibility.

V. CONCLUSION

From a purely practical standpoint, the comparative analysis of Public Law Litigation experiences in the United States and Argentina reveals disparate results. It becomes clear that the achievement of sustained long-term effectiveness and impact, depends crucially on certain political conditions and technical requirements.

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[267] *See* Coria, *supra* note 155, at 815.

[268] A Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], "*Mendoza*," I.J.E. (2010-XXXIX-851).

With respect to the political conditions, the American experience suggests that structural remedies are effective when the Judiciary acts with the support of the political branches and in an institutional framework in which its authority is undisputed. To this point, the Argentine experience confirms this debated claim. The Supreme Court of Argentina has acted prudently, making a restrictive use of an instrument that is still presented to society as one to resort to in exceptional circumstances. It has thus been sensible to address such issues as those involving the environment or prison conditions, seeking to act in line with, rather than run counter to, the agenda of the other branches of the federal government and of majority public opinion. However, the Supreme Court of Argentina is still inherently weak within the political system, so when the political momentum waned, the cases either came to a standstill or experienced serious retrogression.

It can therefore be gleaned from these observations that resorting to Public Law Litigation and structural reform as a legitimization strategy has not been helpful enough for the Judiciary to claim for itself the authority needed to prevail over the other branches of government. This lack of authority proves to be a major obstacle to the successful use of both a unilateral or a multilateral model of structural reform, because in the latter case, the authority of the judge has an implicitly vital role to play. The deadlock and corruption scandals in which the Argentine cases are now caught, the lack of transparent management, and the absence of strongly convincing results in the collective processes reviewed above can all actively work against the Judiciary's credibility. It follows that the political conditions required for the effective employment of structural remedies do not seem to be currently in place in Argentina, and this may explain the low impact of the intended reform programs.

As for the technical side of the model, the comparative method shows that Argentina, as well as many other Latin American countries, still suffers from an objective deficit in its legislation. The lack of detailed statutory regulation of a class action or collective claims system, explicitly designed to accommodate Public Law Litigation, prevents judges and parties alike from building an active front equipped with sufficient bargaining power. In Argentina, the Supreme Court noticed this problem and attempted to solve it with its decision in *Halabi*, holding informative hearings or with the creation of ad hoc devices such as the "Dialogue Table" in *Verbitsky*. But these judicial initiatives to close the statutory gap have been fruitless, so it comes as no surprise that the implementation of a multilateral model of structural reform has so far proved impossible. Thus, the Argentine case confirms the necessity of legislating thoroughly this area of procedural law, designing a

special class action framework following the path of the Federal Rules of Civil Procedure as amended in 1966, and addressing the many agency problems that regularly arise in this context.

In short, the theoretical model developed in this Article, reveals that countries like Argentina still face objective barriers in both the political and the technical spheres that account for the low impact that the use of structural remedies has had to this day. Aware of these deficiencies, and confronted with dramatic situations such as those underlying the *Verbitsky* and *Mendoza* cases, the Argentine Supreme Court stepped boldly onto the scene. It probably hoped that its decided action in these areas might earn for itself the authority it then lacked, and that it might fill the void of technical instruments with case-by-case solutions. Evidence shows, however, that it does not seem possible to use shortcuts and jump to a quick and effective application of sophisticated multilateral models of structural remedies without first laying solid foundations through the adoption of other legitimization strategies.

Without the proper institutional framework, the Judiciary cannot rely on structural reform as a starting point for a legitimization strategy; as that is, at best, a final destination. Much to the contrary, such a strategy may result in the loss of its main symbolic capital, as structural reform cases bring judges fully into the political arena and drives them away from the prestigious, traditional paradigm of neutral players.

Finally, the Argentine experience confirms once again that in many cases judicialization leads to demobilization and paradoxical results. This may cause major delays in reforms and harm the victim groups. It is thus advisable for legal activists and stakeholders to channel their resources into ensuring the fulfillment of political conditions and technical requirements that will ultimately enable the Judiciary to employ more effective forms of intervention.