

From Equal Protection to the Right to Health: Social and Economic Rights, Public Law Litigation, and How an Old Framework Informs a New Generation of Advocacy

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Since the 1990s, rights to health, food, and shelter have been litigated in South Africa, India, and elsewhere. Human rights scholars and American legal commentators frequently treat social and economic rights litigation as if it were a distinct form of litigation. Academic debate then focuses on whether courts should confront social and economic rights litigation, evaluating how it might succeed where other litigation strategies have failed. This Note argues that social and economic rights cases are a subset of public law litigation, subject to the exactly the same limitations as public law claims. So categorized, scholars can use measures of success developed in public law theory to analyze social and economic rights litigation. Such measures are critical as the debate among human rights theorists moves from whether social and economic rights are judicially enforceable generally to how best to enforce them.

I. INTRODUCTION

On May 1, 2007, the City of Yonkers and minority inhabitants who challenged the city's education and housing policies reached

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a settlement, bringing a quiet close to twenty-seven years of heated litigation.¹ The district court judge, nearing retirement in 2007, had been on the bench for one year when the case appeared on his docket.² On July 25, 2007, the Supreme Court of India issued its twenty-second interim order in litigation challenging the government's failure to implement food programs designed to protect the country's most vulnerable populations, holding the chief secretaries of five states in contempt of court.³

Notwithstanding their apparent differences, this Note argues that these cases are subject to similar limitations and possibilities. Socioeconomic rights litigation,⁴ like the case brought in India, is not different in kind from *United States v. Yonkers Board of Education*,⁵ *Brown v. Board of Education*,⁶ or other attempts at social reform through legal channels. All are examples of structural reform litigation, which aims to unsettle entrenched institutional behavior for public benefit.⁷ Social and economic rights litigation is therefore subject to the same, but not additional, limitations as public law litigation generally.⁸

Elements of this argument have appeared elsewhere. Many commentators have noted that recent social and economic rights litigation call upon judges to perform familiar tasks, such as reasonableness review.⁹ Others have evaluated the implementation

1. Fernanda Santos, *After 27 Years, Yonkers Housing Desegregation Battle Ends Quietly in Manhattan Court*, N.Y. TIMES, May 2, 2007, at B5.

2. *Id.*

3. People's Union for Civil Liberties v. Union of India (*PUCL*), Writ Petition (Civil) No. 196 of 2001 (India July 25, 2007) (interim order) (on file with author).

4. The terms "social and economic rights" and "socioeconomic rights" will be used interchangeably to refer to actions based on claims of rights to health, education, housing, and other basic needs. See, e.g., LOUIS HENKIN ET AL., HUMAN RIGHTS 1373-74 (2d ed. 2009).

5. 624 F. Supp. 1276 (S.D.N.Y. 1985).

6. 347 U.S. 483 (1954).

7. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004).

8. The terms "public law litigation" and "structural reform litigation" will be used interchangeably to refer to litigation that seeks to change entrenched institutional behavior and bring that behavior in line with legal norms. Sabel & Simon, *supra* note 7, at 1017. As used herein, "public law theory" refers to the scholarship that explores the possibilities and limitations of structural reform litigation.

9. Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 17 (2003); Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L L. REV. 673, 679 (2007) (pointing out that reasonableness, which has emerged as a standard for review in the South African Constitutional Court's socioeconomic rights jurisprudence, is a concept lawyers are intimately familiar with).

and enforcement of social and economic rights decisions.¹⁰ However, none have explicitly and categorically framed foreign socioeconomic rights litigation as structural reform litigation, linking public law theory and socioeconomic rights enforcement. So framed, scholars would be better able to evaluate the ability of social and economic rights litigation to achieve its goals. Public law theory provides measures of success in achieving structural change through litigation. Such measures are critical as the debate among human rights theorists moves from whether social and economic rights are judicially enforceable generally to how best to enforce them.¹¹

Part II of this Note explains the distinction between social and economic rights and civil and political rights in human rights scholarship. It then introduces public law theory. In Part III, three case studies illustrate the shared characteristics of social and economic rights litigation in India and South Africa, and traditional structural reform litigation in the United States. The cases also demonstrate common challenges in structural reform litigation related to monitoring and accountability, litigation's effectiveness, and institutional and practical court capacity. Part IV discusses the measures of litigation "success" in public law theory — participation, flexibility, and transparency — and advo-

10. See, e.g., Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008); see also Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351 (2008); Kameshni Pillay, *Implementation of Grootboom: Implications for the Enforcement of Socio-Economic Rights*, 6 L. DEMOCRACY & DEV. 255 (2002), available at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research/socio-economic-rights-transformation-in-sa/2002-vol-6-law-democracy-and-development/Implementation%20of%20Grootboom.pdf>.

11. While for most of the last fifty years the debate over social and economic rights focused primarily on whether courts could implement those rights generally, HENKIN ET AL, *supra* note 4, at 1373, in recent years human rights theorists have focused on how courts should implement them. See, e.g., David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. ON HUM. RTS. 1 (2003) (advocating for an approach to socioeconomic rights jurisprudence that incorporates standards from the International Covenant on Economic, Social, and Cultural Rights, or "ICESCR"); Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 190–91 (2006) (arguing that a minimum-core approach incorporating standards from the ICESCR inappropriately involves judges in utilitarian tradeoffs); Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171, 332 (2006).

cates that these measures should be applied to social and economic rights litigation. Part V concludes.

II. FRAMING SOCIAL AND ECONOMIC RIGHTS LITIGATION AS STRUCTURAL REFORM LITIGATION

By framing social and economic rights litigation as structural reform, this Note responds to the position that the enforcement of social and economic rights is categorically distinct from the enforcement of civil and political rights.¹² This section will first describe the historical division between economic rights and civil rights, and then present and respond to arguments against adjudicating social and economic rights. The characteristics that define public law and distinguish it from private law will then be introduced. Finally, social and economic rights litigation will be reframed as a subset of public law.

A. SOCIAL AND ECONOMIC RIGHTS IN HISTORICAL PERSPECTIVE: ARGUMENTS AGAINST JUDICIAL ENFORCEMENT

International human rights law traditionally distinguishes two categories of rights: (1) civil and political rights, and (2) economic and social rights.¹³ An oft-cited reason for the division is the need for separate mechanisms for enforcement. The post-World War II drafters of the international human rights covenants viewed immediate judicial enforcement as necessary to protect civil and political rights, but concluded that socioeconomic rights ought to be subject to democratic choices regarding resource distribution.¹⁴ The perceived difference remains today.

12. Compare International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (“ICCPR”), with International Covenant on Economic, Social and Cultural Rights *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (“ICESCR”). For an explanation of the decision to create a separate document for each class of rights, see OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS, AND LAWYERS, 683–85 (2003), <http://www.ohchr.org/Documents/Publications/training9chapter14en.pdf>.

13. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *supra* note 12, at 683.

14. *Id.* at 687–88 (describing the principal arguments in favor of separating civil and political rights, and social and economic rights, into two separate covenants: “[S]ome speakers warned against confusing the unity of the rights themselves with uniform enforcement because there was a distinction between the unity of human rights in principle and their separation in practice” (internal quotation marks omitted)).

Civil and political rights are the purview of courts; economic and social rights belong to legislators.¹⁵ The recent expansion of socioeconomic rights litigation renewed the debate over whether courts could reasonably manage social and economic rights claims.¹⁶

Arguments against the judicial enforcement of social and economic rights usually focus on either the competence or integrity of the judiciary or the prerogative of the political branches. Those concerned with judicial competence argue that courts have neither the expertise nor the resources necessary to analyze budgets, nor the ability to measure legislative and executive resource-distribution decisions against broad constitutional standards.¹⁷ Others argue that litigating sensitive social and economic matters facilitates judicial activism, as the issues bring the judge's policy preferences to the forefront.¹⁸ A related argument focuses on judicial integrity rather than competence: even if courts were capable of evaluating policy choices against manageable standards, doing so undermines their institutional position. In other words, social and economic rights necessarily involve resource

15. For example, former Human Rights Watch Executive Director and President of the Open Society Institute Aryeh Neier voices his concern as follows:

The concern I have with economic and social rights is when there are broad assertions . . . of a right to shelter or housing, a right to education, a right to social security, a right to a job, and a right to health care. There, I think, we get into territory that is unmanageable through the judicial process and that intrudes fundamentally into an area where the democratic process ought to prevail.

Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1, 1 (2006).

16. See, e.g., DAVID KELLEY, *A LIFE OF ONE'S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* 21–28 (1998). This Note argues that the debate over the judiciary's ability to manage social and economic rights cases incorrectly assumes that there is a categorical difference between socioeconomic rights litigation and traditional civil-rights litigation. In fact, many of the arguments raised against adjudicating socioeconomic rights claims are the same arguments raised against adjudicating public law claims generally. For a response to those arguments in the context of traditional civil-rights claims, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1304 (1976).

17. Some counter this argument by observing that courts frequently evaluate complex factual issues and are relied upon to make legal conclusions based on expert testimony. See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 512 (1974) (in technically complex environmental litigation, courts should start from the position of embracing, rather than abdicating, their supervisory role).

18. Law professor Lon Fuller uses this argument to criticize public law litigation generally, focusing on impartiality and party participation as the primary norms litigation strives for. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

distribution, and embroiling the courts in political battles over resource distribution compromises their independence.¹⁹

A related critique is concerns preserving the legislative, instead of the judicial, role. Because judicial policy-making allows indeterminate rights to replace democratically determined policy preferences, it arguably supplants congressional choices with determinations from the least politically accountable branch of government.²⁰ This argument reflects a concern with compromising democratic processes generally and with encroaching on legislative power in particular.

Each of the above arguments has been levied against the judicial enforcement of social and economic rights *as if it is unique* to that category of rights. Such a categorical approach is inaccurate and misleading. Charges of judicial overreaching, separation-of-powers violations, and inappropriate judicial involvement in policy-making have been directed with similar force against traditional civil rights litigation.²¹ One does not have to go far to find criticisms of public law litigation for encroaching on legislative prerogative or democratic preferences; any newspaper will do.²²

Rather than presenting an entirely new set of concerns, the judicial enforcement of social and economic rights raises the same potential problems as public law litigation generally.²³ In a

19. Justice Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1388–89 (2000) (acknowledging and addressing criticisms of judicial capacity and accountability in making determinations about social and economic rights). Justice Sachs is a judge on the South African Constitutional Court.

20. See Fuller, *supra* note 18, at 400–01 (arguing that political, but not judicial, methods can solve polycentric problems, such as those that structural litigation poses).

21. Chayes, *supra* note 16, at 1309.

22. See, e.g., Bruce Weber, *The Deciders: Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1 (discussing judicial activism and judicial restraint as those concepts were framed at the outset of Senate hearings on the confirmation of Justice Sonia Sotomayor). Consider, too, critiques of judicial activism in substantive due process or of levels of scrutiny under equal protection doctrine. See, e.g., Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 182 (1973) (critiquing the Supreme Court's decision in *Roe v. Wade*).

23. Along with what this Note deems practical arguments against judicial enforcement of social and economic rights, there are fundamental arguments over whether social and economic rights are “rights” at all. See MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 65 (1973). That theoretical debate has been explored at length elsewhere. See generally ALAN GEWIRTH, THE COMMUNITY OF RIGHTS (1996); JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, 10–15 (1993); CARL WELLMAN, WELFARE RIGHTS (1982). This Note engages the practical arguments against adjudicating social and economic rights and evaluates the possibilities and limitations of social and economic rights

landmark 1976 article, Harvard professor and public law scholar Abram Chayes identified and responded to critiques of public law litigation remarkably similar to the arguments against judicial enforcement of social and economic rights. Professor Chayes addressed arguments that public law problems are not fit for judicial resolution,²⁴ that judicial resolution of public law claims exceeds the scope of legitimate judicial activity,²⁵ and that the court has little basis for evaluating competing claims on the public purse.²⁶

This Note does not respond to criticisms of social and economic rights as legal rights generally,²⁷ nor does it address the instrumental or fundamental criticisms of public law litigation.²⁸ The thesis is more conservative: socioeconomic rights cases are a subset of public law litigation and are subject to exactly the same limitations as traditional public law litigation — and should be evaluated accordingly. This view of social and economic rights litigation marks a shift from previous thinking regarding the distinctions between civil and political rights, and economic and social rights. It also opens economic and social rights decisions to a body of scholarship for evaluating the successes and failures of public law litigation generally.

litigation. It will be assumed for the purposes of this discussion that social and economic rights are human rights.

24. Chayes, *supra* note 16, at 1304. For the contrary position (that structural reform litigation exceeds judicial competence), see Fuller, *supra* note 18, at 382.

25. See Chayes, *supra* note 16, at 1307–09. Chayes also responds to the argument that courts determining public law remedies encroaches on Congress’s policy-setting prerogative: “[T]o retreat to the notion that the legislature itself — Congress! — is in some mystical way adequately representative of all the interests at stake, particularly on issues of policy implementation and application, is to impose democratic theory by brute force on observed institutional behavior.” *Id.* at 1311.

26. *Id.* at 1307–09.

27. CRANSTON, *supra* note 23, at 65; Neier, *supra* note 15, at 1. Notably, the indeterminacy critique has been applied with equal force against rights generally, not only social and economic rights. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363–65 (1984).

28. See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 264 (1977) (concluding that there is an unacceptably high risk of error in structural reform).

B. DEFINING STRUCTURAL REFORM LITIGATION: PUBLIC LAW VERSUS PRIVATE LAW

While arguments against the judicial enforcement of social and economic rights are not unique, they do highlight genuine concerns about the efficacy and suitability of litigation as a tool for social change. Rather than fixating on differences between socioeconomic rights litigation and civil rights litigation, a better response is to evaluate social and economic rights litigation as a kind of structural reform. This section will define structural reform litigation, using definitions and characteristics that public law scholars have developed.²⁹ Identifying these characteristics will highlight how social and economic rights litigation is a subset of structural reform litigation, subject to known constraints and possibilities.

For over fifty years, American courts have dealt with challenges to education and housing policies, police brutality, abuse in mental health institutions, voter districting, and prison conditions, developing a body of decisions collectively referred to as public law or structural reform litigation.³⁰ While any definition is unlikely to be wholly satisfactory, public law litigation can be broadly defined as litigation that aims to restructure public agencies.³¹ Public law theory identifies several key differences between structural reform and traditional private litigation, most of them interrelated.

First, whereas private litigation generally arises out of disputes between private parties about private rights, public law litigation seeks to vindicate constitutional or statutory policies.³²

29. By using the definition of public law that Abram Chayes developed in 1976, Chayes, *supra* note 16, this Note hopes to avoid defining public law litigation to fit the illustrative cases. While Chayes' defense of public law litigation remains controversial, his definition of public law became canonical. Sabel & Simon, *supra* note 7, at 1017.

30. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (challenging segregation in primary and secondary public schools); *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980) (challenging overcrowding and brutality in Texas prisons); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972) (challenging conditions and care in mental health institutions in Alabama); *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995) (recognizing a justiciable right to a sound basic education in New York's constitution).

31. Sabel & Simon, *supra* note 7, at 1015; see Chayes, *supra* note 16, at 1284. Legal scholar Owen Fiss uses the term "structural reform." Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

32. Chayes, *supra* note 16, at 1284.

Public law litigation aims to effect structural change in public policy for future public good, and not to repair past harm. Second, the party structure in public law litigation is amorphous and multiplicitous, and the traditional adversarial relationship mixes repeatedly with negotiation and mediation processes.³³ Third, following from the amorphous party structure and the mixing of adversarial relationships with negotiation and mediation, structural reform places different demands on judges.³⁴ Maintaining judicial independence, and even managing a docket, may be an entirely different undertaking for a judge in a public law case as compared to a private civil suit.³⁵ Finally, structural reform raises distinctive remedial challenges arising from the public nature of the claims and the institutions involved.³⁶ Once a court finds wrongdoing, the remedy may require new schools, new housing projects, new regulations, and action by administrators, mayors, or city council members. Remedies are more complex than the typical damage award in traditional private litigation.³⁷

In sum, public law litigation (a) seeks to enforce a perceived public good, (b) implicates multiple interests that do not fit neatly into a traditional two-party structure, (c) demands judicial involvement that is extremely different from a traditional private lawsuit, and (d) presents unique remedial challenges. Social and

33. *Id.* Private litigation can still be complex or multiplicitous. However, private litigation normally is a dispute between two diametrically opposed interests. *Id.* at 1282.

34. *Id.* at 1298.

35. *Id.*; see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982) (in public law cases, judges have departed from their traditional disinterested position to adopt a more active, managerial stance). *But see* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1397 (1991) (impartiality and independence are basic norms of judicial legitimacy under both traditional and structural reform models of litigation).

36. See Chayes, *supra* note 16, at 1298 (“The centerpiece of the emerging public law model is the decree. It differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it *is* the centerpiece.”); Fiss, *supra* note 31, at 44–58. See generally Sabel & Simon, *supra* note 7; Sturm, *supra* note 35.

37. Chayes recognized that some areas of the law defy simple definition:

School desegregation, employment discrimination, and prisoners’ or inmates’ rights cases come readily to mind as avatars of [public law litigation] But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud . . . union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management — cases in all these fields display in varying degrees the features of public law litigation.

Chayes, *supra* note 16, at 1284.

economic rights litigation shares those characteristics, an abstract point that becomes more tangible in the context of individual cases.

III. CASE STUDIES IN STRUCTURAL REFORM LITIGATION FROM THE UNITED STATES, INDIA, AND SOUTH AFRICA

The three case studies in this section are examples of public law litigation. Each case seeks to enforce public goals, implicates multiple interests, places demands on judges not generally present in traditional two-party private litigation, and presents unique remedial challenges. Viewed through the public law lens, the case studies also illustrate the inherent problems in litigating for social change: monitoring and accountability; litigation's effectiveness; and institutional and practical court capacity. In the setting of social and economic rights litigation, those challenges deserve more attention than they have received. This Note argues that public law theory provides tools that can help evaluate the successes and limitations of economic and social rights litigation. Thus, the enforcement of the court's decree in each case warrants special attention.

In this section, case studies from India and South Africa are compared with *United States v. Yonkers Board of Education*,³⁸ a paradigmatic example of structural reform in the United States. The foreign cases were generally chosen for their wide acclaim.³⁹ Each case study will begin with a more specific justification for its selection. This will be followed by discussion about whether the court's decision was successfully implemented. Each case study will conclude with an evaluation of the case's structural reform characteristics.

A. *UNITED STATES V. CITY OF YONKERS*

United States v. City of Yonkers exemplifies structural reform litigation in American legal practice and provides a point of comparison for the foreign social and economic rights cases that fol-

38. 624 F. Supp. 1276 (S.D.N.Y. 1985).

39. Cases from India and South Africa were chosen because of the widespread recognition of those countries as leaders in socioeconomic rights adjudication.

low.⁴⁰ When the case was filed, Yonkers, a suburb of nearly two-hundred thousand located just north of the Bronx, had concentrated nearly all of its public housing in the city's southwest corner. More than eighty percent of the city's minority population lived in a neighborhood that made up about thirty-eight percent of the city's overall population.⁴¹ Housing segregation meant that the vast majority of Yonkers' children attended functionally segregated schools.⁴² The U.S. Department of Justice brought suit, alleging that both school and housing segregation were due to purposeful discriminatory action by the City of Yonkers and that the concentration of subsidized housing in southwest Yonkers violated the Fair Housing Act and the Equal Protection Clause.⁴³ The NAACP and a class of black Yonkers residents intervened.⁴⁴

In 1985, Judge Sand of the Southern District of New York found for the plaintiffs on all counts.⁴⁵ With regard to housing segregation, which would become the most controversial aspect of the *Yonkers* decision,⁴⁶ Sand ordered the City of Yonkers to build two hundred housing units outside of southwest Yonkers immediately and to create a plan for the development of additional integrated, subsidized housing.⁴⁷ The Second Circuit upheld both the substantive and remedial decisions unanimously,⁴⁸ and the Supreme Court denied certiorari.⁴⁹

The Yonkers City Council refused to comply with the decree's housing remedy.⁵⁰ In 1987, Judge Sand issued an ultimatum. Either the city would adopt a plan, or he would impose five-hundred-dollar-per-day fines on resisting officials and one-hundred-dollars-per-day fines on the city, which would double for

40. See Jonathan L. Entin, *Learning from Yonkers: On Race, Class, Housing, and Courts*, 44 HOW. L.J. 375, 378–83 (2001) (reviewing LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (1999)) (providing an excellent overview of the social and legal progression of the *Yonkers* housing litigation).

41. *Yonkers Bd. of Educ.*, 624 F. Supp. at 1291.

42. *Id.* at 1384–86.

43. *Id.* at 1291–92, 1367–77.

44. *Id.* at 1289.

45. *Id.* at 1276.

46. Entin, *supra* note 40, at 380.

47. *Yonkers Bd. of Educ.*, 635 F. Supp. at 1581–82 (housing remedy order).

48. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

49. *Yonkers Bd. of Educ. v. United States*, 486 U.S. 1055 (1988).

50. James Feron, *Yonkers Seeks to End Pact on Housing Ruling*, N.Y. TIMES, Mar. 11, 1988, at B2.

each succeeding day of noncompliance.⁵¹ The Supreme Court stayed the fines against council members but not the city.⁵² Faced with the prospect of draconian layoffs as the daily fine approached seven figures, two of the holdout Yonkers council members changed sides and voted to comply with the consent decree.⁵³ The City broke ground on the first new housing project in 1991. Yonkers fulfilled the two-hundred-housing-unit requirement with units scattered across seven sites, completing the last site in 1994.⁵⁴ In 1998, New York State agreed to pay \$16.4 million to help Yonkers reach the long-term housing-desegregation targets that Judge Sand's order established, bringing to a close the housing portion of the *Yonkers* litigation.⁵⁵ The remaining claims settled in 2007, more than two decades after the first district court decision.⁵⁶

Many studies have sought to evaluate the impact of the scattered public housing in Yonkers, but success is difficult to define. The first phase of construction provided homes for only two-hundred families, barely three percent of the public housing population in Yonkers.⁵⁷ Public satisfaction polls showed mixed results. In one study, whites surveyed believed their neighborhoods were good places to live, regardless of their proximity to subsidized housing units.⁵⁸ However, Latinos and African Americans had much less positive attitudes about their homes and were less likely to report that they planned to stay long-term.⁵⁹

51. *United States v. City of Yonkers (Yonkers II)*, 856 F.2d 444, 450 (2d Cir. 1988). The fines would exceed \$200 million by day 21 and \$26 billion by day 28, bankrupting the city in about three weeks. *Id.* The Second Circuit modified the fine against the city to top out at \$1 million per day from day 15 on. *Id.* at 460.

52. *Spallone v. United States*, 487 U.S. 1251, 1251 (1988).

53. Entin, *supra* note 40, at 85. The city elected the council member who most vehemently opposed implementing the housing desegregation decision as mayor. James Feron, *Election Victory Casts Spallone in a New Role*, N.Y. TIMES, Nov. 12, 1989, at 12WC1.

54. Mary McAleer Vizard, *In the Region / Westchester: Yonkers Completes Its 7th Public Housing Project*, N.Y. TIMES, Sept. 18, 1994, at 9.

55. Joseph Berger, *Pact to Provide Minority Housing in White Areas in Yonkers*, N.Y. TIMES, Dec. 2, 1998, at B1.

56. Santos, *supra* note 1, at B5.

57. Entin, *supra* note 40, at 393.

58. Xavier de Souza Briggs et al., *In the Wake of Desegregation: Early Impacts of Scattered-Site Public Housing on Neighborhoods in Yonkers, New York*, 65 J. AM. PLAN. ASS'N 27, 42-43 (1999).

59. *Id.*

The *Yonkers* case exemplifies structural reform litigation. Applying the characteristics identified in the previous section, *United States v. City of Yonkers* (a) sought to enforce a perceived public good, (b) implicated multiple interests that do not fit neatly into a traditional two-party structure, (c) demanded judicial involvement that was dramatically different from a traditional private lawsuit, and (d) presented unique remedial challenges. Each characteristic will be explored briefly below.

The *Yonkers* plaintiffs sought to effect structural reform by challenging city housing and education policies under the Fair Housing Act and the Fourteenth Amendment. The U.S. Department of Justice, the NAACP, and a class of black residents brought the case in the public interest, not in the private interest of any individual. The party structure was multiplicitous, and, as the litigation progressed, many non-parties were effectively drawn into the litigation, including city council members.⁶⁰ *Yonkers* also demonstrates the complex role of judges in public law litigation. Between 1985 and 2007, the district court judge worked with, and at times against, parties to the litigation to remedy policies deemed unconstitutional. As noted in the introduction, the *Yonkers* litigation spanned and largely defined Judge Sand's career on the federal bench.⁶¹

Remedial challenges like those in *Yonkers* — a situation with recalcitrant city officials, political resistance, and a complex interplay between judicial and political power — are central and perhaps unique to structural reform litigation. Two decades of litigation, one Supreme Court decision, and millions of dollars in fines raises questions about the ability of structural reform litigation to achieve its goals, particularly when studies suggest that nothing changed for the vast majority of Yonkers' minority residents. If the goal of structural reform litigation is to change institutions, and if such litigation requires substantial resources,

60. Feron, *supra* note 50, at B2.

61. Santos, *supra* note 1, at B5. Yale law professor Judith Resnik describes this "new" judicial role as managerial, where judges are called upon to supervise remedies designed to reform schools, prisons, and other institutions. Resnik, *supra* note 35, at 377. Legal philosopher Lon Fuller critiques this kind of judicial action as outside the role of the courts. Fuller, *supra* note 18, at 401–02.

then considerable attention should be directed toward remedial effectiveness.⁶²

B. *PEOPLE'S UNION FOR CIVIL LIBERTIES V. UNION OF INDIA*

Indian legal commentary widely cites *People's Union for Civil Liberties v. Union of India* (“*PUCL*”) for its success in improving government policy through socioeconomic rights litigation.⁶³ In the 1980s, Indian courts began to redefine the relationship between fundamental rights, which were considered justiciable under India’s constitution, and directive principles, which were considered non-justiciable.⁶⁴ In 1985, the Supreme Court of India held that the right to a livelihood, a previously non-justiciable “directive principle,” was part of the right to life, which was a fundamental right and part of the Indian Constitution’s Bill of Rights.⁶⁵ In the decades that followed, the Indian Supreme Court interpreted the constitutional right to life to include rights to housing, health care, and education.⁶⁶ Over that time, the Court

62. Structural reform litigation might be undertaken for other purposes — for example, as a means of highlighting an issue to generate public support. If that is the case, the discussion should proceed on an entirely different basis, that is, whether the resource investment structural litigation requires is an efficient way of generating broad public support.

63. *PUCL*, Writ Petition No. 196 of 2001, available at <http://www.pucl.org/reports/Rajasthan/2001/starvation-writ.htm>. For a discussion of the case, see Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade*, in *Exploring Social Rights: Between Theory and Practice* 171, 176–82 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007), Kamayani Bali Mahabal, *Enforcing the Right to Food in India: The Impact of Social Activism*, *ESR Rev.: Econ. & Soc. Rts. S. Afr.*, Mar. 2004, at 7, http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/esr-review-1/previous-editions/esr_vol5_no1%20March%202004.pdf, and U.N. Econ. & Soc. Council, Comm’n on Human Rights, Report of the Special Rapporteur on the Right to Food, ¶ 24, U.N. Doc. E/CN.4/2006/44/Add.2 (Mar. 20, 2006) (prepared by Jean Ziegler). By contrast, scarcely any reference to the case is made in American legal scholarship.

64. Part III of the Indian Constitution includes civil and political rights such as the rights to life, equality, and freedom of religion. Part IV of the Constitution includes economic and social rights, such as rights to health, education, livelihood, and housing. Those rights are termed “directive principles.” The Constitution explicitly states that the rights in Part IV are not judicially enforceable. *HENKIN ET AL.*, *supra* note 4, at 1501–02.

65. *Tellis v. Bombay Mun. Corp.*, (1985) 2 Supp. S.C.R. 51, available at <http://www.elaw.org/node/2830>.

66. *HENKIN ET AL.*, *supra* note 4, at 1502; see, e.g., *Samity v. State of West Bengal*, A.I.R. 1996 S.C. 2426, available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=401236 (follow “download” hyperlink) (finding a right to access emergency health care in the right to life); *Tellis*, 2 Supp. S.C.R. 51 (expanding the definition of the right to life protected in Article 21 of India’s constitution).

has become increasingly well known for its social and economic rights jurisprudence.⁶⁷ *PUCL* demonstrates the shared characteristics that make socioeconomic rights cases structural reform litigation.

In the 1960s, India established a public distribution system to address the problem of recurring famines. In 1991, in an effort to stabilize export prices, food grain distributions through the centralized system fell, and excess grain supplies began accumulating.⁶⁸ In 2001, India faced a particularly devastating famine. According to an independent 2002 report, about twenty-one percent of India's population was undernourished between 2000 and 2002.⁶⁹ During that time, the Indian government held roughly fifty million tons of grain in silos to control export prices.⁷⁰ While municipal governments claimed that they were unable to act without central authorization, the Indian Prime Minister stated publicly that the reports of starvation were politically motivated and unsubstantiated.⁷¹

In May 2001, the People's Union for Civil Liberties, an Indian advocacy organization, challenged the Indian federal government's grain policy, claiming that the policy violated a famine-control law implemented under British rule⁷² and a constitutional right to be free from hunger. The constitutional claim rested, as previous socioeconomic claims had, on the Supreme Court of India's willingness to read a socioeconomic right into the right to life.⁷³ The Supreme Court of India found that the government's policy violated both the famine-control law and the right to be free from hunger, which it recognized as part of the constitutional right to life.⁷⁴

67. HENKIN ET AL., *supra* note 4, at 1512; *see also* Jayna Kothari, *Social Rights and the Indian Constitution*, 2 L. SOC. JUST. & GLOBAL DEV. (2004), http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/kothari/.

68. Colin Gonsalves, *The Spectre of Starving India*, COMBAT LAW, Aug.-Sept. 2002, <http://www.indiatogether.org/combatalaw/issue3/starve.htm>.

69. International Food Research Policy Institute, *The Challenge of Hunger: Global Hunger Index* (2006), pp. 56 (Appendix E), *available at* <http://www.ifpri.org/sites/default/files/publications/ghi06.pdf>

70. *PUCL*, Writ Petition No. 196, *available at* <http://www.pucl.org/reports/Rajasthan/2001/starvation-writ.htm>.

71. Gonsalves, *supra* note 68; *see also* Kothari, *supra* note 63, at 177-78.

72. Mahabal, *supra* note 63, at 10.

73. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India July 25, 2007) (interim order), *supra* note 3.

74. *Id.*

In November 2001, the Court directed the Union of India and all the state governments to enforce eight different food welfare schemes previously established by the national government.⁷⁵ The Court instructed the government to translate its November 2001 order into English and regional languages and display it, along with lists of persons entitled to benefits, at every house of local government and every school.⁷⁶ When government compliance lagged, the Court appointed two commissioners to monitor implementation of its decision and to submit periodic reports on compliance.⁷⁷ The commissioners' initial reports indicated that while the government attempted to comply with certain provisions of the Court's order, it failed to comply with others.⁷⁸

The Supreme Court of India then issued a series of orders directing the government to implement the famine code, provide grain to families below the poverty line, implement food-for-work programs, grant ration cards to all eligible individuals, and provide midday meal programs in schools.⁷⁹ The Court required that the government post copies of various case-related documents in local languages at every municipal government headquarters, and authorized village councils to report non-compliance.⁸⁰ As of late 2009, litigation was ongoing.

75. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India Nov. 28, 2001) (interim order), <http://www.righttofoodindia.org/orders/nov28.html>.

76. *Id.* (directing that "a copy of this order be translated in regional languages and in English by the respective States/Union Territories and prominently displayed in all Gram Panchayats, Govt. School Buildings and Fair Price Shops" and that, "to ensure transparency in selection of beneficiaries and their access to these Schemes Copies of the Schemes and the list of beneficiaries shall be made available by the Gram Panchayats to members of public for inspection").

77. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India May 8, 2002) (interim order), <http://www.righttofoodindia.org/orders/may8.html>.

78. N.C. SAXENA, IN THE SUPREME COURT OF INDIA ORIGINAL CIVIL WRITTEN JURISDICTION 2 (2002), <http://www.sccommissioners.org/pdfs/comreports/1streport.pdf> (detailing, in the first report of the commissioner, state-by-state compliance with the court's interim orders). For example, while several Indian states attempted to implement school midday-meal programs, all states failed to implement food-for-work programs. Additionally, eight state governments provided either no information or partial information to the commissioners. *Id.* at 2.

79. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India May 2, 2003) (interim order), <http://www.righttofoodindia.org/orders/may203.html>; see also *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India Nov. 28, 2001) (interim order), <http://www.righttofoodindia.org/orders/nov28.html>.

80. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India May 8, 2002) (interim order), <http://www.righttofoodindia.org/orders/may8.html>.

Like *Yonkers*, litigants in *PUCL* sought to bring the behavior of an institution in line with constitutional and statutory requirements. The litigation aimed at changing entrenched institutional behavior — in this case, a set of policies that limited access to grain stores during famine, despite legal requirements that the grain be released. The party structure is also typical of structural reform litigation. Local governments, volunteer monitors, advisors, and countless civil society organizations contribute to the ongoing implementation of the Supreme Court's decision.⁸¹ The case has required extensive judicial involvement, and the remedial challenges typical of structural reform cases are evident in *PUCL*. The Supreme Court of India issued over forty orders between 2001 and 2008, and its commissioners have produced twelve reports on compliance.⁸² The Court relied on both traditional means, such as the contempt power,⁸³ and more creative approaches, such as appointing commissioners and requiring that its decision be publicly displayed, to induce compliance.⁸⁴ These factors suggest that while the substance of the litigation addressed a socioeconomic right, the case is also an example of public law litigation.

C. *TREATMENT ACTION CAMPAIGN V. MINISTER OF HEALTH*

Treatment Action Campaign v. Minister of Health illustrates how reframing social and economic rights litigation as structural reform highlights the possibilities and limitations of litigating for social change.⁸⁵ The end of apartheid was the beginning of a new

81. Arundhuti Roy Choudhury, *Engaging People in Right to Food and Work Litigation*, 43 PARTICIPATORY LEARNING & ACTION 20–22 (2002), http://www.planotes.org/documents/plan_04306.pdf.

82. Interim orders through 2007 and commissioner's reports through 2008 are available on the commission's website, which the Supreme Court established to monitor compliance with the decision. Index Page- Supreme Court Commissioners, <http://www.sccommissioners.org> (last visited Dec. 6, 2009).

83. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India July 25, 2007) (interim order) (on file with author).

84. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India May 8, 2002) (interim order), <http://www.righttofoodindia.org/orders/may8.html>.

85. See *Minister of Health & Others v. Treatment Action Campaign & Others* (TAC) 2002 (5) SA 703 (CC) (S. Afr.). In contrast to its short shrift in American legal discourse, remedial action in *Treatment Action Campaign* and other socioeconomic rights cases have been critiqued substantially in South African legal scholarship. See Lehmann, *supra* note 11, at 164–65. Compare Puneet K. Sandhu, Comment, *A Legal Right to Health Care*:

constitutional order for South Africa, and an opportunity for the judiciary to chart a new path.⁸⁶ Between 1994 and 1996, multiple actors representing diverse interests drafted a new constitution, one that recognized substantive social and economic rights.⁸⁷ South Africa's socioeconomic rights jurisprudence has since become a focal point for global discussions of economic and social rights.⁸⁸ Many commentators argue that *Treatment Action Campaign v. Minister of Health* and other South African cases demonstrate an effective and manageable approach to making economic and social rights justiciable.⁸⁹ Viewing *Treatment Action Campaign* through the lens presented here shifts attention away from the novelty of the right-to-health claim to the possibilities and limitations of the case in achieving its goals.

In 2000, three separate drug efficacy trials in the U.S., South Africa, and Uganda demonstrated that giving an HIV-positive mother a single dose of the antiretroviral nevirapine at the time of delivery, followed by a single dose given to the newborn, reduced the risk of mother-to-child transmission of HIV by nearly fifty percent.⁹⁰ No significant adverse reactions were reported.⁹¹ In early 2001, the South African Medicines Control Council approved the treatment for use in preventing mother-to-child-

What Can the United States Learn From Foreign Models of Health Rights Jurisprudence?, 95 CAL. L. REV. 1151, 1191 (2007) (suggesting that establishing a right to health care necessarily furthers the goal of access to health care, and praising the constitutional court's jurisprudence), with Mark Heywood, *Contempt or Compliance? The TAC Case after the Constitutional Court Judgment*, 4(1) ESR REVIEW 7, 9–10 (2003).

86. See generally David Dyzenhaus, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (2003).

87. Among others, the new South African Constitution recognized a right to health. S. AFR. CONST. 1996 art. 27, available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27>. For an excellent discussion of the drafting process that led to the adoption of the 1996 Constitution, see Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human rights Perspective*, 47 AM. J. COMP. L. 67 (1999).

88. South Africa's right-to-health litigation, for example, plays a prominent role in the social and economic rights section of a leading human rights text. HENKIN ET AL., *supra* note 4, at 1428–51.

89. See generally Mark S. Kende, *The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617 (2004); Lehmann, *supra* note 11.

90. L. Guay et al., *Intrapartum and Neonatal Single-Dose Nevirapine Compared with Zidovudine for Prevention of Mother-to-Child Transmission of HIV-1 in Kampala, Uganda: HIVNET 012 Randomised Trial*, 354 LANCET 795 (1999).

91. *Id.*

transmission.⁹² In April 2001, Boehringer Ingelheim, the manufacturer of nevirapine, offered an unlimited supply of the drug to South Africa for mother-to-child transmission prevention. The South African government refused, and health regulations prevented physicians working in public hospitals from prescribing the drug to pregnant women.⁹³

In August 2001, Treatment Action Campaign (“TAC”) filed suit against the Minister of Health of South Africa and each of the nine provincial health ministers, alleging that by failing to allow public sector physicians to prescribe nevirapine and by failing to develop a comprehensive plan to address mother-to-child transmission, the national and provincial governments had violated the constitutionally protected right to health.⁹⁴ In December 2001, the Pretoria High Court⁹⁵ granted TAC the relief it sought, finding the government had violated women and children’s right to access healthcare under Section 27 of South Africa’s Constitution.⁹⁶ The high court maintained jurisdiction over the case, and ordered the government to report back by March 31 of the following year with a comprehensive plan to reduce mother-to-child transmission of HIV and the steps it had taken to ensure access to nevirapine in the public sector.⁹⁷ The government objected to the reporting requirement, which it viewed as an encroachment on executive power.⁹⁸

Hearing the case on appeal, the constitutional court upheld most of the substance of the trial court’s order. The court declared that the government’s policy was a violation of the right to

92. *South Africa: Top Aids Official Flees Meeting in Tears*, BUSINESS DAY, (Johannesburg) Apr. 9, 2001.

93. The refusal is best understood in political context. South African President Thabo Mbeki had repeatedly expressed skepticism that HIV caused AIDS. *Dissident Supports ‘Plot Against Mbeki’ Theory*, MAIL & GUARDIAN May 10, 2001. Then-Minister of Health, Dr. Tshabalala-Msimang, was a close ally of the president and a political appointee. She stood by Mbeki’s view, and also exhibited skepticism concerning the safety and efficacy of antiretrovirals, medical best practice notwithstanding. Kerry Cullinan, *HIV Drug for Pregnant Mums to Get Go Ahead*, CAPE ARGUS, June 5, 2001. It was in this context that the South African judiciary encountered TAC’s claim.

94. *Minister of Health v. Treatment Action Campaign (TAC) 2002 (5) SA 703 (CC)* at 728–29 (S. Afr.).

95. A South African trial court located in what is now Guateng Province.

96. *TAC 2002 (5) SA 703 (CC)* at 730–31 (S. Afr.).

97. *Id.*

98. *Appeal in Nevirapine Case Could Take up to a Year*, S. AFR. PRESS ASS’N, Dec. 19, 2001, <http://allafrica.com/stories/200112190703.html>.

health, ordering it to develop and implement a reasonable plan to prevent mother-to-child transmission of HIV and to lift restrictions on access to nevirapine in the public sector.⁹⁹ However, the court declined to mandate that the government produce its plan for review or report on its progress, expressing confidence that the government would comply in good faith.¹⁰⁰ Four days after the court's decision was handed down, TAC sent letters to all nine provinces requesting information on what steps would be taken to comply with the constitutional court's order.¹⁰¹ Four provinces partially responded; the remaining five provided no response.¹⁰²

TAC and other members of civil society faced enormous challenges in ensuring that the constitutional court's decision was implemented. As Amy Kapczynski, a legal scholar, and Jonathan Berger, counsel for TAC in the case, explain, "[a]lthough the government insisted that it was complying with the ruling, it also refused to give TAC information about its plans and progress. Only after TAC threatened further legal action did the government provide it with information about what had been done to comply."¹⁰³ While the Court's decision supported provinces that were previously disposed to implementing antiretroviral therapy to prevent mother-to-child transmission, other provinces were either unable or unwilling to act.¹⁰⁴

Mpulamanga province exemplifies the latter category. TAC began to pressure Mpulamanga's Department of Health after it received no response to its initial inquiry into the province's plan for reducing mother-to-child transmission of HIV. TAC and Mpulamanga exchanged correspondences between July and December 2002 to no avail. As a result, in December 2002, TAC applied for

99. TAC 2002 (5) SA 703 (CC) at 762–63 (S. Afr.).

100. *Id.*

101. Heywood, *supra* note 85, at 9–10.

102. *Id.* Mark Heywood, head of the AIDS Law Project and Treasurer for TAC, reflects further on the case and TAC's overall strategy in *Shaping, Making and Breaking the Law in the Campaign for a National HIV/AIDS Treatment Plan*, in *DEMOCRATISING DEVELOPMENT: THE POLITICS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA* 181–212 (Peris Jones & Kristian Stokke eds., 2005).

103. Amy Kapczynski & Jonathan M. Berger, *The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa*, in *HUMAN RIGHTS ADVOCACY STORIES* 23 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323522 (follow "download" hyperlink); see also Heywood, *supra* note 85, at 9.

104. Heywood, *supra* note 85, at 9–10.

a contempt of court order.¹⁰⁵ The province then commenced a roll out of nevirapine in its tertiary hospitals.

TAC and other civil society organizations have experienced difficulty obtaining reliable information about how many pregnant women in South Africa need HIV testing, counseling, and treatment, and how many receive it at public health centers.¹⁰⁶ The South African Department of Health claimed that in 2004 nearly eighty percent of pregnant women who needed nevirapine received it.¹⁰⁷ An independent South African report estimated forty-four percent for the same year.¹⁰⁸ In 2005, the World Health Organization estimated 14.6 percent.¹⁰⁹

Treatment Action Campaign shares the previously discussed characteristics that define structural reform litigation. TAC brought its case with the goal of changing entrenched institutional behavior, and pursued this goal through a claim that the government's HIV policy violated the constitutional right of access to health care. The litigation was pursued for public benefit, not private interest. The party structure was multiplicitous.¹¹⁰ Resistance resulted from a complex interplay of politics and activism at both national and regional levels. The judiciary grappled with how best to ensure compliance with its decision.¹¹¹

105. *Id.*

106. Kapczynski & Berger, *supra* note 103, at 23 & n.137.

107. DEPT OF HEALTH, REPUBLIC OF S. AFR., PROGRESS REPORT ON DECLARATION OF COMMITMENT ON HIV AND AIDS 21 (2006), <http://www.doh.gov.za/docs/reports/2006/ungass/part1.pdf> (“[A]n estimated 78.7% of pregnant HIV+ women received nevirapine to reduce the risk of MTCT in public sector facilities in 2004.”).

108. PETER BARRON ET AL., HEALTH SYS. TRUST, THE DISTRICT HEALTH BAROMETER, YEAR 1 (2005), http://www.healthlink.org.za/uploads/files/DHB_Year1.pdf.

109. JOINT U.N. PROGRAMME ON HIV/AIDS, 2006 REPORT ON THE GLOBAL AIDS EPIDEMIC 455 (2006), http://data.unaids.org/pub/GlobalReport/2006/2006_GR_ANN1M-Z_en.pdf; World Health Org., JOINT U.N. PROGRAMME ON HIV/AIDS, & UNICEF, TOWARDS UNIVERSAL ACCESS: SCALING UP PRIORITY HIV/AIDS INTERVENTIONS IN THE HEALTH SECTOR; PROGRESS REPORT, APRIL 2007 (2007), http://us-cdn.creamermedia.co.za/assets/articles/attachments/04672_hiv:aidsaccess.pdf.

110. Litigation was part of a much larger advocacy strategy undertaken by TAC and its membership, which included thousands of South Africans with HIV. Heywood, *supra* note 85. For the government, compliance required action by multiple government officials at both the provincial and the national level.

111. *Minister of Health v. Treatment Action Campaign (TAC)* 2002 (5) SA 703 (CC) at 762–63 (S. Afr.). That the judiciary ultimately declined to maintain supervisory jurisdiction does not itself detract from the case as an instance of structural reform. Both the trial court and the Constitutional Court explored whether to maintain supervisory jurisdiction, indicating the complexity of the judicial role in structural reform.

Finally, the case presented remedial challenges that are often absent from traditional private litigation. TAC and other advocacy groups encountered significant challenges in implementing the final decree. Many of those challenges arose from monitoring. The Constitutional Court's refusal to affirm the lower court's reporting requirement implicitly charged TAC with the task of monitoring government implementation. The only way to enforce the court's order in the face of government noncompliance was to bring an action to hold the government in contempt of court for failing to implement a plan — a task that the government's recalcitrance made infinitely more difficult.

IV. ADOPTING AND APPLYING A PUBLIC LAW REMEDIAL FRAMEWORK IN SOCIAL AND ECONOMIC RIGHTS LITIGATION

This section aims to apply remedial standards developed in public law theory to social and economic rights litigation. As the above cases demonstrate, there is often a gap between court orders and implementation in social and economic rights litigation, and an even larger gap between the litigation's goals and accomplishments. By providing standards for judicial remedies, public law theory helps to narrow this gap.¹¹² Both critics and proponents of public law litigation evaluate the legitimacy and efficacy of such remedial tools as consent decrees,¹¹³ structural injunctions,¹¹⁴ and the use of court-appointed mediators to formulate

112. This is mostly a theoretical exercise. While empirical studies on the effectiveness of desegregation orders and housing programs exist, *see* Briggs et al., *supra* note 58, legal scholars rarely conduct them and do not usually cite to them. None of the major public law theorists considered here — Professors Chayes, Fiss, Sturm, Sabel, or Simon — consider empirical evidence in crafting their recommendations for efficacious structural reform litigation.

113. *See, e.g.*, Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 915–16 (2004) (critiquing consent decrees as a means of achieving institutional-reform litigation). A consent decree is “[a] court decree that all the parties agree to.” BLACK’S LAW DICTIONARY 441 (8th ed. 2004). Judges frequently use consent decrees in American public law cases, leaving it to the parties to negotiate a settlement. Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 725–26 (1986).

114. Sabel & Simon, *supra* note 7, at 1052–53. Professors Sabel and Simon emphasize the role of public law claims in destabilizing entrenched government action. According to this view, courts entertaining these claims intervene in public life to destabilize prelitigation expectations through political, cognitive, and psychological effects. *Id.* at 1020. Remediation, according to Simon and Sabel, has moved from rigid, top-down court orders

remedies or outside experts to provide recommendations.¹¹⁵ Of the many markers of remedial success that might be drawn from public law theory, three will be applied here: (1) participation, (2) flexibility, and (3) accountability.¹¹⁶ Though these are not the only norms that could be considered, they are fundamental to the success and legitimacy of adjudicative attempts to reform public institutions.

A. PARTICIPATION

Both critics and proponents of structural reform litigation identify participation as critical to legitimate judicial process.¹¹⁷ Professor Susan Sturm identifies meaningful participation for interested groups as one of the critical norms that should guide public law remedial practice.¹¹⁸ Professor Sturm argues that interest group and individual participation is important for several reasons: it respects the dignity of the individual and protects the value of due process; it enhances the prospects for a reasoned and accurate decision; it identifies the group of parties responsible for a particular social problem and involves them in problem-solving; and it serves an educational function, exposing plaintiffs to the difficulties involved in implementing a solution early on and helping all parties identify obstacles and potential solutions.¹¹⁹

Sturm's argument pre-supposes that some party is willing to participate, which has not always been present in litigation challenging entrenched government policies, as the *Yonkers* case demonstrates. Judge Sand's original 1985 remedial order followed a bench trial of nearly one-hundred days, with eighty-four wit-

toward increasingly flexible, party-negotiated decrees and injunctions, which function to induce internal deliberation and external transparency. *Id.* at 1071.

115. Sturm, *supra* note 35, at 1368–69, 1371–72.

116. Other goals could be identified. This Note assumes that efficacy is a reasonable goal for judges to consider in crafting remedies, but recognizes that it is certainly not the only one. Public law scholars draw upon each other's measures of proper judicial decision-making. For example, Owen Fiss cites independence and efficaciousness as potentially in tension for judges when crafting structural remedies. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121, 127 (1982), available at <http://www.springerlink.com/content/m076716j42r432n2/fulltext.pdf>.

117. See Fiss, *supra* note 31, at 42; Fuller, *supra* note 18, at 364.

118. Sturm, *supra* note 35, at 1392–93.

119. *Id.* at 1392–94.

nesses, thirty-eight depositions, and thousands of exhibits.¹²⁰ By the end of 1987, the City of Yonkers had taken “no significant action” to comply with the remedial order.¹²¹ In January 1988, the parties entered a consent decree approved by the city council under which the city council agreed to enact enabling legislation to facilitate housing goals, including zoning changes and tax abatements.¹²² Six months later, the city council voted against a resolution of intent to implement the consent decree and the court’s remedial orders.¹²³ The result was a contempt order that was appealed to, and partly overturned by, the Supreme Court.¹²⁴

If council members and other city officials had been given more of an opportunity for meaningful participation in crafting a remedy in *Yonkers*, they might not have opposed the court’s remedial orders with such vehemence. However, the political climate in Yonkers did not allow for easy capitulation to the court’s housing order, and at times it seemed to demand hostility.¹²⁵

Like the court in *Yonkers*, the South African Constitutional Court in *Treatment Action Campaign* faced a reluctant government whose cooperation was essential to implementing the court’s order. The court chose deference over participation, refusing to mandate specific remedial action because it believed that the South African government would comply in good faith.¹²⁶ Such deference may have been unwarranted, however, there are many reasons for a court — particularly one as young as South

120. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985); *see also* Entin, *supra* note 40, at 379.

121. *Yonkers II*, 856 F.2d 444, 448 (2d Cir. 1988).

122. *Id.* at 448–49.

123. *Id.* at 449; *see also* James Feron, *Yonkers Faces New Court Sanctions*, N.Y. TIMES, July 10, 1988, at 12WC1.

124. *Spallone v. United States*, 493 U.S. 265, 276–80 (1990).

125. James Feron, *Defiance Wins Again in Yonkers Vote*, N.Y. TIMES, Nov. 12, 1989, § 4, at 7. Feron notes that, in 1987, incumbent Agelo Martinelli lost the mayoralty “because his once firm opposition to a court-ordered housing desegregation plan had softened.” *Id.* The winner was Wasicsko, a young Democrat who urged opposition to the plan, but changed direction shortly after coming to office. *Id.* In 1989, he was replaced by Henry Spallone, who led the fight against compliance and was the named plaintiff in the related litigation. *Id.*

126. *Minister of Health v. Treatment Action Campaign (TAC) 2002 (5) SA 703 (CC)* at 763 (S. Afr.) (“The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.”). The Court’s decision partially reflected the evolution in government policy that occurred during the litigation; several provinces had instituted programs to prevent mother-to-child-transmission. *Id.* at 764.

Africa's — to avoid embroiling itself in the remedial challenges of structural litigation.¹²⁷ Judicial legitimacy is a scarce resource in a young democracy. *Yonkers* and *Treatment Action Campaign* represent two ends of the spectrum of how a court may respond to a political body's refusal to participate in the remedial process.

People's Union for Civil Liberties suggests a way to improve participation.¹²⁸ The court-appointed commission involved multiple civil society stakeholders in monitoring implementation and making recommendations for further action.¹²⁹ The commission also sought information from state and local governments on how the court's interim orders have been implemented. However, it has not pursued input on shaping future orders from local officials with the same veracity.¹³⁰

Still, meaningful participation extends beyond government willingness to cooperate. A judicial process that does not result in a structural remedy may provide the opportunity for individuals wronged by unconstitutional action to dialogue with their government — the *process* component of participation.¹³¹ Moving away from the remedial context in which Professor Sturm develops the idea, the participation model may serve several purposes. For example, broad participation in a public law case may help individuals affected by or interested in the litigation identify the relevant actors in government and civil society. In *Treatment Action Campaign*, relevant actors included individuals with HIV/AIDS demanding access to treatment, public interest organizations such as the Treatment Action Campaign, the individual lawyers and activists who further their work, and the various levels of government, from the medical staff at public hospitals who participate directly in patient care to the highest levels of the executive branch charged with creating and implementing

127. This may be particularly true when, as here, the actors opposed to the litigation are the highest ranking political officials in the state.

128. Notably, however, the court in *PUCL* has yet to issue a final judgment, and it is unclear how much input various actors have had in structuring the court's interim orders.

129. See, e.g., *SAXENA*, *supra* note 78, at 3–5.

130. *Id.*

131. Susan Sturm emphasizes the role participation may play in educating plaintiffs. Sturm, *supra* note 35, at 1394. That may be true of some plaintiffs in some circumstances. However, for a grassroots civil-society organization rather than a legal-advocacy organization, participation in lawsuits is an inefficient way to educate people about their rights. See Treatment Action Campaign, About Us, <http://www.tac.org.za/community/about> (last visited Nov. 18, 2009).

health policy. Focusing on participation encourages thoughtful consideration of the interplay between these actors.

B. FLEXIBILITY

The fact that circumstances evolve over time presents a challenge for litigation that aims to change how institutions function in the long term.¹³² Remedial practice in structural litigation should therefore be flexible. Comparing early American public law cases with later ones, Professors Sabel and Simon portray American public law remedial practice as increasingly flexible.¹³³ Under their model, public law remedies have evolved from command-and-control injunctive regulation, meaning a central authority's comprehensive regime of fixed and specific rules, to increasingly dynamic remedies.¹³⁴ The approaches that Professors Sabel and Simon depict combine more flexible and provisional targets with procedures for ongoing stakeholder participation and for assuring accountability.¹³⁵

Professors Sabel and Simon do not address whether those targets are practically more effective at achieving the goals of structural reform than the more traditional approaches they disfavor. Development and rights scholars challenge the utility of targets in ensuring rights, and experience from socioeconomic rights advocacy and development work may enrich public law theory's approach.¹³⁶ Nevertheless, a flexible approach that incorporates stakeholders' views is intuitively more likely to succeed than one that does not.

Yonkers is an example of a top-down, court-controlled approach to remedial action where the court issued detailed orders requiring the Yonkers City Council to pass specific resolutions.¹³⁷

132. Fiss, *supra* note 31, at 47–48 (noting that “[t]he concept ‘violation’ can be used to describe the object of the remedy only if it is understood in a prospective, dynamic, and systemic sense”).

133. Sabel & Simon, *supra* note 7, at 1019.

134. *Id.*

135. *Id.*

136. The use of targets in rights advocacy is beyond the scope of this Note. For a thorough discussion, see AnnJanette Rosga & Margaret Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L L. (forthcoming 2009), http://www.chrgj.org/publications/docs/wp/rosga_satterthwaite.pdf.

137. Karla Grossenbacher, Note, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227, 2247 (1992). While Sabel and Simon

PUCL incorporates elements of both old and new approaches as defined by Simon and Sabel. The Supreme Court of India has maintained jurisdiction over the case, frequently issuing specific remedial orders with none being dispositive, and the Court charges its commissioners with suggesting further action for moving institutions toward constitutional compliance.¹³⁸ The commissioners also monitor the compliance of various government institutions.¹³⁹

Flexibility can be pursued at the expense of all other variables. But then it becomes useless. The most flexible relief in a public law case is a declaration. In this sense, the remedial decision in *Treatment Action Campaign* provided government officials with greater flexibility in achieving compliance than either *PUCL* or *Yonkers*. The constitutional court issued an order requiring the government to remove restrictions on nevirapine's use in the public sector and to develop a reasonable policy for reducing the risk of mother-to-child HIV transmission.¹⁴⁰ The court created flexibility within this mandatory order, specifying that it did not "preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV."¹⁴¹

The court's decision not to maintain supervisory jurisdiction meant that to achieve the recalcitrant government's compliance with the court's order, the plaintiffs would have to return to court, and TAC did just that.¹⁴² According to Professor Fiss, American public law litigation tried but eventually abandoned

discuss housing desegregation litigation as dispositive evidence of the posited evolution, they do not discuss *Yonkers*. According to their criteria, *Yonkers* is paradigmatic of the old guard, with a federal judge issuing detailed remedial orders and seeking enforcement when compliance is not forthcoming. Sabel & Simon, *supra* note 7, at 1021–22.

138. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India May 8, 2002) (interim order), <http://www.righttofoodindia.org/orders/may8.html> (establishing the position of commissioners); see also *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India Oct. 29, 2002) (interim order) <http://www.righttofoodindia.org/orders/oct29.html> (noting that further action by the court is to "await the next Report of the Commissioners").

139. SAXENA, *supra* note 78, at 17–18.

140. Minister of Health v. Treatment Action Campaign (TAC) 2002 (5) SA 703 (CC) at 765 (S. Afr.) (paragraph 3(a)–(d) of the order).

141. *Id.* As for the other underlying claim, which sought to change the South African government's woefully inadequate HIV policy, the Court issued only declaratory relief. *Id.* at 764–65.

142. Heywood, *supra* note 85, at 9–10.

this approach in the early years of structural reform litigation. The judge's role was "simply to decide whether the existing arrangements were constitutional"; if they were not, it was "entirely the defendant's responsibility to propose steps that would remedy" the violation.¹⁴³ Fiss contends that this left judges in an awkward position of choosing between frequently using the criminal contempt power and an endless series of declarations concerning acceptability.¹⁴⁴ The plaintiffs in *Treatment Action Campaign* encountered a similar problem. Recourse to more dynamic remedial strategies, including a role for judges in mediating between parties and establishing reporting guidelines, might help avoid the awkward position Fiss describes.

C. TRANSPARENCY

Transparency in governance, meaning access to information about government acts, is a third value central to the remedial process in structural reform litigation. From Fiss¹⁴⁵ and Chayes¹⁴⁶ to Sabel and Simon,¹⁴⁷ public law theorists reference the importance of government transparency in structural reform litigation. While transparency is frequently cited, commentators rarely analyze it.¹⁴⁸ This Note argues that transparency is central to structural reform litigation and that access to information is critical for judges and advocates in crafting relief and implementing decisions.

143. Fiss, *supra* note 31, at 55.

144. *Id.*

145. *Id.* at 24. Fiss notes that, "[i]n the course of the reconstructive process, the judge must ultimately penetrate the institutional facade, take the lid off the so-called black box," for structural reform litigation to succeed. *Id.*

146. Chayes, *supra* note 16, at 1297 (arguing that "[t]he extended impact of the judgment [in a public law case] demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that more explicitly recognizes the complex and continuous interplay between fact evaluation and legal consequence").

147. Sabel & Simon, *supra* note 7, at 1042.

148. Perhaps this is less an oversight than a reflection of stages in democratic development and standards of good governance. The process of obtaining information in the United States may be cumbersome, but the ultimate degree of access is likely better than developing democracies. In developing democracies, including diverse states like India and South Africa, access to information remains a significant barrier to challenging government action regarding statutory requirements or fundamental rights.

The establishment of a Fair Housing Office to collect information related to housing needs and other services indicates that monitoring concerns played a central role in the district court's decision in *Yonkers*.¹⁴⁹ As part of his first remedial order, Judge Sand instructed the parties to suggest monitors to oversee and report on the implementation of the court's education desegregation order.¹⁵⁰ *PUCL* placed a similar emphasis on accountability, and, as of late 2009, court-established commissioners still bear primary responsibility for monitoring compliance.¹⁵¹ The commissioners interface with local officials, perform site visits, and compile their information into periodic reports to the court; they have issued twelve reports thus far.¹⁵² All reports and interim court orders are available to the public on the commissioners' website.¹⁵³

In *Treatment Action Campaign*, the court did not assign monitoring responsibility, creating a significant barrier to civil society organizations that wished to evaluate government compliance.¹⁵⁴ The failure to assign monitoring responsibility was perhaps the most significant shortcoming of the *Treatment Action Campaign* decision. Because of that failure, TAC and other activist organizations wasted considerable resources attempting to ascertain the government's HIV policy was — information that should have been publicly available.

Assigning monitoring responsibility is key when successful implementation requires the establishment of output goals or when inaccessible information creates a barrier to the claimant's involvement in monitoring implementation. Courts finding in

149. 635 F. Supp. 1577, 1579 (S.D.N.Y. 1986).

150. *United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538, 1552 (S.D.N.Y. 1986). The monitor was to have broad access to information and could make recommendations to the court "with respect to changes she/he believes necessary to make the plan more effective." *Id.*

151. *PUCL*, Writ Petition (Civil) No. 196 of 2001 (India May 8, 2002) (interim order), <http://www.righttofoodindia.org/orders/may8>.

152. See, e.g., N.C. SAXENA, SECOND REPORT OF THE COMMISSIONER TO THE SUPREME COURT 4 (2003) <http://www.sccommissioners.org/pdfs/comreports/2ndreport.pdf>. The website contains all twelve Reports, and a consolidated version of all substantive interim orders through 2007. Supreme Court Commissioners, Commissioner's Reports, <http://www.sccommissioners.org/reports> (last visited Nov. 18, 2009).

153. *Id.*

154. *Minister of Health v. Treatment Action Campaign (TAC) 2002 (5) SA 703 (CC) at 762 (S. Afr.)*. The court stated that transparency was essential to ensure compliance, but did not include anything in its order to that effect.

favor of public law claimants should explicitly assign responsibility for monitoring implementation. When information barriers significantly hinder civil society advocacy, the exact remedy may be less important than ensuring government accountability in implementing the remedy.

V. CONCLUSION

Scholars and activists in the United States have long questioned whether social and economic matters are properly deemed rights at all, and whether courts are equipped to address socioeconomic claims. Foreign law decisions challenging government policies as violating social and economic rights form part of the canon of public law litigation. Further, those decisions are closely analogous to U.S. decisions seeking broad institutional reform through the courts.

Viewed through the public law lens, the three case studies illustrate problems as well as possibilities. These problems include challenges to ensuring accountability, important questions about litigation's effectiveness, and significant burdens on institutional and practical court capacity. After shifting focus from the right being protected to the social change sought, there is much less of a disparity between *Treatment Action Campaign* and *Yonkers*. Understanding social and economic rights cases as a type of public law litigation facilitates the exchange of norms between social and economic rights literature and public law theory, allowing for the enrichment of both. None of the cases presented here have achieved complete resolution, but all exemplify progress in the advancement of fundamental rights.

Characterizing social and economic rights cases as public law litigation does not suggest that recognizing these rights is unnecessary. Such rights must be recognized before they can be weighed against otherwise legitimate government policies.¹⁵⁵ Framing the above cases in this way is merely a first step toward evaluating social and economic rights adjudication using familiar tools. In the end, social and economic rights claims are not so different from other kinds of public law litigation, seeking, as all

155. Ronald Dworkin has suggested that rights serve this function. See RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 198–99 (1978).

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such litigation does, to challenge entrenched government practice through the courts.