New Public Law: A Glance Back at the Situation in the US and and Look Ahead at its Bright Future Elsewhere (in *Revista de Interés Público*, Vol. 1, Issue 2, June 2017)

When it first appeared in 2004, *Destablization Rights: How Public Law Litigation Succeeds*, co-authored with William Simon, traced the promising evolution of an experimentalist variant of public law litigation, which, at the time, seemed a distinctively, even uniquely US judicial innovation. In public law litigation courts may find whole institutions—police departments, school systems, child welfare agencies—in violation of constitutional or statutory norms, and place them under judicial supervision until the failures are corrected, typically by implementing a comprehensive plan for reform elaborated by the stakeholders and executed under the supervision of a master appointed by the court, with the approval of the parties.

Since then, public law litigation, especially in its experimentalist or deliberative variant, has retained its promise as an instrument of reform. But while the use of the new public law is seldom contested, its application has not apparently increased in scope or frequency; doctrine, while tolerant, has rarely embraced it explicitly, even at the trial court level, where injunctive orders are made and reforms supervised.

The surprising and encouraging development has come elsewhere, outside the US. Public law litigation is becoming more salient, and in some cases producing innovative institutional arrangements, in countries such as Colombia, India, South Africa and of course Argentina. What distinguishes these countries as a group is the combination of strong constitutional judiciaries, active civil societies, fractured or congealed political parties, and weak administrative structures that struggle—and often fail—to bear the burdens placed upon them. In all of them new public law is an effort, among others, to make something—something effective and democratically accountable—of a difficult situation. The publication of this able translation of the article, following closely upon the appearance of a deeply informed and penetrating study by Pablo Carducci of the encouraging turn in the environmental cleanup of the Matanza-Riachuelo basin—the leading new public law case in Argentina, and surely one of the most interesting and instructive anywhere—provides a welcome occasion to say a word about the vicissitudes of public law litigation in the US and, more importantly, to begin to join reflection on the possible utility of this instrument in middle income countries straining to meet the social and economic expectations of their citizens and obligations of their constitutions.

Until the 1960s, courts in the US, as elsewhere, responded to administrative wrongdoing either by negating particular administrative acts, or by imposing money damages on institutions or particular officials (to circumvent problems of sovereign immunity to legal action). This began to change as evidence mounted, first in the South, then the North, of resistance to the order to racially desecrate public schools contained in the famous Supreme Court decision of *Brown v. Board*. When local school authorities dragged their feet, federal court placed them under injunctions to devise a plan of desegregation. From these beginnings the practice spread to reform of other institutions, notably prisons and metal-health facilities. Abraham Chayes (Chayes,

Abraham. "The Role of Judges in Public Law Litigation, Harward Law Review." (1976)) and Owen Fiss (Fiss, Owen M. "The Supreme Court, 1978 Term." Harvard Law Review 93.1 (1979): 1-281) recognized the new practice as a distinct form of public law litigation, focused not, as in the common law, on the resolution of a discrete dispute in the past involving two private parties, but rather the long-term restructuring and monitoring of public institutions, at the instigation, and with the continuing participation of an amorphous group of parties and stakeholders.

All this was familiar to American readers of the article, and we only recalled it in passing. The focus instead was on a shift in the nature of the remedy imposed after a finding of institutional liability. Whereas the early reform plans, embodied in consent decrees issued under court authority, tended to specify in great detail how the reforming institution was to operate—the size and lighting of prison cells; the number and training of support personal in mental health facilities; the period within which certain key decisions had to be taken or services provided—more recent ones broke with this command-and-control approach in favor of experimentalist methods: agreement on framework goals—an adequate eduction—metrics for assessing progress towards them, and regular review of results to generalize successes, respond to failures, and if need be, modify metrics or clarify goals. The argument was that the emphasis on continuing, transparent stakeholder participation and deliberation—as a last resort, when the ordinary political reform process has manifestly failed—made the remedy more effective, by allowing adjustment to unforeseen circumstances and unintended consequences, and more legitimate, by reducing the danger of judges acting both beyond the range of their competence, and outside the boundaries judicial authority, at the expense of the legislature and democratic self determination in general. Put another way the claim was that citizens have the right to demand the destabilization of institutions that persistently fail to meet constitutional responsibilities, with the aim of elaborating, through the corresponding new public law remedies, a pathway to reform that addresses systemic problems.

What has become of new public law in the interim? In some domains the reforms that such litigation helped catalyze have themselves become so far-reaching, extensive, and protean that, at least for now, new public law litigation is at best incidental to them. The clearest example is public eduction, the home territory of the innovation. New public law litigation played an important role in reforms at the state level—in Texas, Kentucky and Tennessee, among others—that established the viability of new governance principles under the rubric of of “new accountability”— increased autonomy at the district and school level in instructional practices and budget control in return for heightened responsibility to meet improvement goals, such as reduction in the achievement gap between vulnerable groups and high performers. The new accountability was incorporated in national legislation in the No Child Left Behind Act of 2001. This law in turn framed and animated countless municipal and state reforms, whose successes and (often needless) missteps threatened and antagonized teachers unions and some of the dissolved communities they were intended to benefit. (Liebman, James S., and Charles F. Sabel. "Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform." NYU Rev. L. & Soc.

Change 28 (2003): 183.) Amidst the ensuing backlash the most capable and rapidly improving components of the reform movement have reconstituted themselves outside the traditional public school sector as “charter” schools—schools, as the name implies, chartered under public authority, financed largely with public funds, and in the best cases subject to close scrutiny of their performance by the educational authorities. These changes have simply outpaced the capacity of the school reform lawyers, of whatever stripe, to respond. Here, if anywhere, one might say that new public law is at least in part a victim of its own success.

In the case of the reform of police departments, in contrast, the story is of slow progress, interrupted by the election of Donald Trump as President. Under a 1994 statute, the Department of Justice is authorized to investigate police departments suspected of engaging in a “pattern or practice” of racial discrimination. The findings of these investigations typically result in public law consent decrees. In time these decrees have required departments to look more and more carefully at practices and administrative routines that heighten the risk of abuse. For instance, the performance of individual officers is regularly reviewed to detect signs of stress that could lead, in a crisis, to an impermissible response, and to trigger a remedial response before harm is done; similarly the behavior of supervisors is reviewed to check that they respond in a timely and effective way to such alerts. A number of the decrees go farther still, and require forms of problem-oriented policing, in which officers, often in collaboration with community members or their representatives, focus attention and remedial efforts on the small number of active criminals and “criminogenic” locations—bars at the end of certain alleys—responsible for the bulk of wrongdoing even in high-crime areas. (Sabel, Charles F., and William H. Simon. "The Duty for Responsible Administration and the Problem of Police Accountability." Yale J. on Reg. 33 (2016): 165.) But just as a recent string of horrific police shootings demonstrated the need to redouble these efforts, and consent decrees were starting to proliferate, control of the Department of Justice passed into the hands of Attorney General notoriously sympathetic to harsh policing, and dismissive of reform. Earlier attempts to choke off public law litigation—for example by legislation increasing the burdens on plaintiffs in suits alleging unconstitutional prison conditions—failed, and may have led to innovations that improved the plaintiffs’ case. So too it may prove possible to bring public law suits against lawless police departments without the aid of the Department of Justice. But for now, new public law reform of policing seems to have been brought to a standstill.

In still other domains new public law remedies have proved more effective than other approaches, yet still achieved only modest results. Writing of public law litigation to improve the conditions of students with special needs under the Individuals with Disabilities Education Act of 1990, Bagenstos finds that comprehensive, command-and-control remedies fared poorly compared to experimentalist consent decrees, but that overall the direct impact of judicial intervention of any kind has been slight (though magnified somewhat by demonstration effects), and that “notwithstanding the legalistic nature of the statute, the federal courts have very little involvement in the administration of education for individual with disabilities.” (Samuel R. Bagenstos, “The Judiciary’s Now-limited Role in Special Education, in Dunn, Joshua M., and Martin R. West, eds.

From Schoolhouse to Courthouse: The Judiciary's Role in American Education. Brookings Institution Press, 2010.) So it goes. Despite important differences across domains, new public law in the US retains its promise without anywhere becoming an indispensable practicality for reformist lawyers.

The discussion of new public law, as theory and as practicality, in the middle-income countries with strong constitutions and weak administrative institutions is more urgent, if only because the gap between pressing public problems and available public problem solving capacity is clearly large and seems to be growing. The new public law responses of the countries in this group form a continuum defined by the extent to which courts actively encourage institutional innovation to elaborate and implement remedies.. At one pole is South Africa. There the constitutional court has rejected efforts to define a minimum, substantive core to economic and social rights such as the right to decent housing. Instead, it has taken a “proceduralist turn,” establishing boundary conditions on the exercise of public authority by declaring unconstitutional certain practices, such as unjustified evictions, and requiring the relevant public entities to adopt inclusive and fair procedures for reaching decisions that implicate the corresponding rights. Where some commentators see this turn as a decorous cover for retreat from judicial enforcement of social and economic rights, Brian Ray argues persuasively that proceduralization opens the way to the dialogic remedies associated with experimentalism. But even assuming that this is so, it remains the case that the South African court, concerned to demonstrate scrupulous respect for the traditional separation of powers, is unwilling to foment, let alone insist on the creation of new institutions to effect this dialogue. (Ray, Brian. Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave. Cambridge University Press, 2016.) US public law litigation is, for what it is worth, much less institutionally constrained with regard to such innovations. As Chayes appreciated, the master in continuing consultation with the parties constitutes a kind of purpose-build administrative entity—notionally a flexible, precisely focused mini-agency—designed to guide reform in a particular case.

Colombia occupies a middle position in this continuum of institutional audacity. The court’s response there is best exemplified in the decision T-25 of 2004, finding that an “unconstitutional state of affairs” (Estado de cosas inconstitutional or ECI) existed with regard the millions of persons displaced by civil war. In this case the court itself has been an extremely active monitor, as reflected in 84 proceedings (autos) and 13 public review sessions in the the 6 years following the original decision. But while all this activity testifies to the court’s recognition of the need for continuing review of official response to its finding of unconstitutional behavior, it appears that in this case too the judges held back from creating institutions that facilitate, and when necessary, compel stakeholder collaboration in the articulation and adjustment of reforms. (Rodríguez-Garavito, César. Más allá del Desplazamiento: Políticas, derechos y superación del desplazamiento forzado en Colombia, Universidad de Los Andes, 2009.)

Argentina, viewed in the light of the Matanza-Riachuelo basin case and cleanup, is at the opposite pole of the continuum, developing a variant of dialogic, public law remedy rich in institutional innovation and ramifying, or so it seems, into the fabric of

administration at the local, provincial and federal levels. The task is daunting. The basin is burdened by—literally—two centuries of accumulated industrial wastes; and to this legacy is added the damage caused daily by the operation of of 15,397 firms, many of which are point sources of pollution.

Carducci details the development of a workable system of inclusive deliberation and monitoring by the parties and stakeholders, ultimately under the supervision of the supreme court. The decision, in 2008, knit together an autonomous supervisory agency—La Autoridad de Cuenca Mantanza Riachuelo (ACUMAR), formed two years earlier to integrate the pertinent national powers with those of the city and province of Buenos Aires—and a new collegiate body (Cuerpo Colegiado) consisting of the national ombudsman and human rights and environmental NGOs active in the area. Until 2012 oversight of the deliberation was delegated to the Juez Federal de Quilmes, who approach owed much more to command and control than experimentalism. In that year, however, the supreme court, in a new case, divided responsibility for oversight between the Juzgado National en lo Criminal y Correccional Federal N. 12—responsible for supervision of contracts formed in the course of the clean up and budgetary matters generally—and the Juzgado Federal en lo Criminal y Correccional N. 2—responsible for compelling the various administrative entities to undertake the tasks agreed through deliberation to mitigate the damage to the basin, prevent future harm, and generally improve the quality of life of its inhabitants: the overarching purposes of the original decision.

To give a rough idea of the range and volume of the matters handed by the second, “executive” court: it is currently processing more than a 1,000 matters related to the general objectives fixed by the supreme court, arranged under general topic headings like “Urbanización de Villas y Asentamientos Precarios” and by geographic jurisdiction (Lanús, Lomas de Zamora, La Matanza, Almirante Brown, and so on, with three distinct files for questions regarding la Ciudad Autónoma de Buenos Aires). Each and every one of these matters is to be addressed in periodic sessions in which civil society actors, the relevant public authorities and auditing bodies (organismos públicos de control), convened and coordinated by an official of the executive court, formulate working plans—including measures to inform citizens of changes that will affect them—and review progress towards goals already fixed. Thus far the Juzgado Federal en lo Criminal y Correccional Nº 2 has conducted more than 200 such sessions, and conducted more than a hundred “judicial inspections,” in which the judges gain first hand impressions of local conditions and public opinion. In the two and half years in which this deliberative method has been routinely operating only 5 decisions by the local court have been appealed—surely a sign that the deliberations are inclusive and that result in plans that widely embraced/

But it just at this point that curiously explodes. Have the plans produced a demonstrable reduction in contamination? In current pollution? Have living conditions generally improved? Are NGOs interacting with public authorities in new ways? Are there new forms of local political activism or changes in the behavior of established parties?

And what about public administration and administrative law? If collaboration across city, provincial and national levels, and among various administrative bodies, has been successful, is it spilling over in ways that improve the operation of the various collaborating entities? Or, put another way, is deliberative problem solving at the local level percolating upwards and sidewise in administration more generally? How, if at all, is the process of revising or at least adapting administrative law and practice through stakeholder deliberation integrated or reconciled with the traditional cannons of administrative law practice?

And on and on. The successes of new public law in the US, important as they are, have been too sporadic and contained to raise questions of this kind. Developments in middle-income constitutional democracies under social and economic stress now hold more promise. Among such countries Argentina is quite possibility in the vanguard. Its supreme court and judiciary are committed to vindicate at least some social and economic rights by insisting on inclusive, deliberate reform of parts of public administration. More yet: Just as the depth and breath of this combination of judicial commitment and restraint is becoming evident, a new generation of political leaders is rising. Some of these leaders—the governor of the Province of Buenos Aires, María Eugenia Vidal, comes to mind—are deeply aware of the pathologies of the state and the parties, and credibly committed to building institutions that serve the vulnerable. If—a crucial if—new public law reforms on the scale of the Mantanza-Riachuelo clean up succeed, they will likely be noticed. Putting hope upon hope, inclusive administrative innovations could then help fill the void left by the disarray of current political programs, and so reverberate within public administration and its relation to courts and citizens.

But the immediate task, commended as much by the demands of honesty and curiosity as by disappointment with our political choices is to see in detail what reform in Mantanza-Riachuelo has wrought, where it falls short and where, in the tradition of public law litigation old and new, it surprises with innovations in law and democracy that make us see new possibilities in both.