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BOOK REVIEW

Kent Roach, *Remedies for Human Rights Violations – A Two Track Approach to Supra-National and National Law*, Cambridge University Press, 2021, 632 pp., ISBN 978-1-108-41787-7, £99.99
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Remedies play a critical part in the life of human rights law: They reverse or mitigate the effects of past human rights violations, address the needs and expectations of victims and create incentives and disincentives for would-be or repetitive violators. Still, the difference between the degree of attention afforded in human rights theory and practice to questions pertaining to the scope of legal protection afforded by distinct rights under different circumstances and conditions and to questions relating to the remedies due after such rights have been violated is considerable. Indeed, during the time I served on the Human Rights Committee, I was struck by the marginality of discussions about remedies in individual communication proceedings: The parties to the case have rarely argued about the suitability of alternative remedies, and hardly ever submitted any evidence to support or refute claims for specific remedies. The decision of the Committee to issue in 2016 *Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights*[1] was aimed at encouraging stakeholders involved in individual communication to expand and better structure their arguments concerning remedies, but has produced limited effects to date.

Professor Roach's new book on *Remedies for Human Rights Violation* is intended to fill the gap in the literature on human rights remedies, to conceptualize human rights remedies and to draw attention to the limited engagement of human rights law theory and practice with remedy design. The book is ambitious, spanning more than 500 pages, covering a variety of theories on what constitute effective remedies and discussing actual approaches to human rights litigation in several domestic legal systems and international human rights mechanisms. The comprehensive survey of human rights law theory and practice serves as the basis for Roach's central normative claim, i.e., that remedies for human rights violations should follow a two track approach: past-looking individual remedies aimed at addressing harms which have already occurred or would have occurred in the absence of judicial intervention; and forward-looking remedies of a systemic or collective nature that are aimed at changing the laws and policies still giving rise to individual violations.

The approach to remedies advocated by Professor Roach is sophisticated and persuasive. It builds on his extensive expertise and impressive scholarship on Canadian and comparative public law, as well as on his deep knowledge of national and international human rights law. The approach pursued in the book is also pragmatic in nature. It acknowledges the need for judges to be modest about the extent to which social change can be facilitated through judicial decisions, bearing in mind, *inter alia*, separation of powers considerations and the epistemic limits of judges when confronted with *polycentric* disputes. The structure of remedies issued should also consider proportionality considerations (mirroring to some extent the way such considerations affect the substantive balancing of rights against other rights and public interests) and the phenomenon of remedial failure (i.e., the chronic under-implementation of remedies by state agencies). Given the

[1]Human Rights Committee, Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/158 (2016).

many difficult challenges associated with systemic remedies, Professor Roach recommends opting for a dialogic process, involving courts giving expression to general normative expectations, maintaining the primacy of the other branches of government in determining the specific law and policy changes which should ensue from it, yet retaining some power in the judiciary for reviewing the compatibility of the measures taken with the prescribed remedial expectations.

It is within this framework of the two-track approach that specific remedies awarded in public law and human rights litigation are discussed in detail throughout the book. These include damages, injunctions, invalidation of legislation, suspended declarations of invalidity, declarations of incompatibility, interpretative presumptions, measures of satisfaction, guarantees of non-repetition, interim (or provisional) measures, and more. The book critically evaluates the legitimacy and effectiveness of such remedies and pays special attention to specific areas of the law which pose a particular challenge for applying human rights remedies: violations of due process rights in criminal proceedings, socio-economic rights, and the rights of indigenous peoples. Such an evaluation includes, for example, a discussion of the extent to which the different remedies are sufficiently flexible, yet principled and transparent,[2] the allocation of burdens of proof concerning the need to provide specific remedies or moderate their effects[3] and whether remedial options are hampered by overly broad immunity rules.[4]

Ultimately, the two tracks which Professor Roach convincingly argues for mutually reinforce one another: Individual remedies reward victims for pursuing litigation, illustrate the adverse effects of violating laws and policies, and shape the contours of systemic remedies which ought to address the rights of other actual or potential victims. At the same time, systemic remedies are needed to advance the promotion and protection of human rights in society and to avert the need of all potential individual victims to initiate individual legal proceedings in order to vindicate their rights (something which could also result in swelling judicial dockets). Pursuing the first track without the second track could cause serious problems, such as 'queue jumping' and regressive protection (i.e., affording remedies only to litigants who have access to the resources that are needed for pursuing litigation) or affording states with the option of 'buying out' the right to continue to violate human rights.[5] By contrast, pursuing the second track without the first would risk upsetting the legitimate expectations of actual litigants and in depriving states of a strong incentive to implement systemic remedies to avoid future demands for individual remedies.[6] By dealing with both *micro* and *macro* injustices, the holistic approach advocated by Roach affords the human rights in question with strong and comprehensive protection giving thereby a new life to the traditional *ubi jus, ibi remedium* principle.

The vision Roach offers in the book is one in which all branches of government are invested in upholding human rights, with courts playing a catalytic role at the granting of remedies stage. The remedies issued are, *inter alia*, intended to push the relevant political institutions and stakeholders into action, while retaining a meaningful degree of judicial supervision over their action. Such forms of interaction take place before the judgment is issued (i.e., interim or provisional measures), in the judgment itself and during the post-judgment stage. Roach's thinking on the judicial-political interplay and the method of remedy design appears to be heavily influenced in this regard by models of supervision developed at the regional level – in the European and Inter-American human rights system. Truth should be told, however, that actual compliance with remedial orders generated and supervised by these regional judicial bodies remains sub-optimal – either because of

[2]K. Roach, *Remedies for Human Rights Violations – A Two Track Approach to Supra-National and National Law* (2021), 524–5, 533.

[3]Ibid., at 331–2.

[4]Ibid., at 276–7.

[5]Ibid., at 117–18.

[6]Ibid., at 119–21. Roach mentions the UK prisoner voting *saga* as illustrative of a situation where individual remedies could have better supported a policy change than a general declarative remedy (p. 223).

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the limited political support their operations enjoy or due to the over-ambitious nature of some of the remedies they demand.[7]

Still, *Remedies for Human Rights Violations* offers a rare combination of a comprehensive and systematic review of existing theory and practice, and the application of a robust analytical framework, which builds upon experiences derived from a multiplicity of legal systems, different types of remedies and a variety of judicial philosophies. Professor Roach's extensive research of human rights remedies issued in widely different legal contexts facilitates the identification of good practices – such as the European Court of Human Rights' experience with issuing both individual and general remedial measures,[8] instances of broad public participation in the design of systemic remedies,[9] and the retention of jurisdiction by Canadian courts while suspended declarations of invalidity are pending.[10] It also allows the calling out of problematic practices, such as American style punitive damages[11] and broad immunities.[12]

The book is brimming with facts and insights about human rights remedies, including, for example, the dangers to judicial authority of overreaching with non-enforceable remedies,[13] the possibility of gradually ratcheting up remedies in the face of non-compliance or partial compliance,[14] the centrality of the notion of irreparable harm[15] and proportionality considerations in interim measures human rights litigation,[16] the potential blunting effect of weak remedies in cases involving strong judicial review and *vice versa*,[17] the inverse relations between the extent of the remedies awarded and the inclination to narrowly construe rights,[18] the need to consider 'read in' or 'severance' when interpreting legislation as systemic remedies in the face of government inertia,[19] the preferability of public over private remedies[20] and no-damages to trivial damages,[21] the tendency of courts to undercompensate victims and to use vague criteria for calculating damages,[22] the role qualified immunities can play in encouraging adherence to good governance standards,[23] the relationship between causality in first-track remedies and the need to respect the equality of all right holders,[24] and the importance of protecting core-right components (especially in relation to socio-economic rights)[25] and promoting consensual remedies (especially in cases involving indigenous peoples).[26]

[7]For a discussion see, e.g., Ø. Stiansen, 'Directing Compliance? Remedial Approachand Compliance with European Court of Human Rights Judgments', (2021) 51 *British Journal of Political Science* 899, at 900–5; C. M. Bailliet, 'Measuring Compliance with the Inter- American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America', (2013) 31 *Nordic Journal of Human Rights* 477, at 478–80, 494–5; P. B. M. da Cruz, 'Trackers and Trailblazers: Dynamic Interactions and Institutional Design in the Inter-American Court of Human Rights', (2020) 11 *Journal of International Dispute Settlement* 69, at 84–9; K. Dzehtsiarou and V. P. Tzevelekos, 'The Conscience of Europe that Landed in Strasbourg: A Circle of Life of the European Court of Human Rights', (2020) 1 *European Court of Human Rights Law Review* 1, at 3.

[8]Roach, *supra* note 2, at 97–9.

[9]Ibid., at 389.

[10]Ibid., at 376.

[11]Ibid., at 81, 265.

[12]Ibid., at 26.

[13]Ibid., at 107.

[14]Ibid., at 91–2.

[15]Ibid., at 132.

[16]Ibid., at 160–6.

[17]Ibid., at 179.

[18]Ibid., at 414.

[19]Ibid., at 199, 202. Such remedies would be suitable when dealing with the rights of unprotected groups, such as members of the LGBT+ community, resulting in adding them to lists of protected groups or striking out language that excludes them from the scope of protection. Remedies of this nature do give rise, however, to considerable separation of powers concerns.

[20]Ibid., at 242.

[21]Ibid., at 256.

[22]Ibid., at 240.

[23]Ibid., at 267.

[24]Ibid., at 273.

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A remaining challenge for human rights scholars and practitioners is to implement the models and normative recommendations developed by Professor Roach in legal and institutional contexts other than those discussed in the book: Whereas the broad survey offered is excellent, it does remain heavily dominated by common law systems and by legal theories that dominate the academia in English-speaking countries (e.g., legal realism). Still, my experience on the Human Rights Committee has taught me that experts trained in the civil law tradition were often more prone to embrace expansive remedies than their common law counterparts. The case law of the Inter-American Court of Human Rights and European Court of Human Rights, which is discussed in the book, also suggests that human rights systems dominated by civil law legal cultures may – sooner or later – adopt broader remedial policies than those found in common law systems. Indeed, it would have been interesting to evaluate the extent to which strict notions of legality developed in the civil law have been conducive to broad formulations of remedial obligations for human rights violations. In the same vein, my own experience suggests that concerns about the level of trust that can be afforded to different governments also influence the design of remedies in cases pertaining to them. This may deserve more attention in practice than the cases discussed by Professor Roach do.

Ultimately, despite the impossibility of dealing with all considerations relevant to each and every remedy in all legal systems, there is little doubt that *Remedies for Human Rights Violations* makes an invaluable contribution to the development of a global approach to human rights remedies spanning both national and international legal systems. It is a must read for human rights students, scholars and practitioners on either side of the domestic/international, common law/civil law or national/supra-national divide who are interested in the law, practice and theory of human rights remedies.

*Yuval Shany**

[25]Ibid., at 432.

[26]Ibid., at 482. Roach warns, however, against the adverse effects which may derive from gaps between bargaining powers of governments and indigenous powers and about the risk of settling for procedural obligations of consultations as a substitute for upholding the rights of indigenous peoples.

*Hersch Lauterpacht Chair in Public International Law, Hebrew University of Jerusalem; Member of the Human Rights Committee (2013–2020).

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